Petition

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES E. BAGGOT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether disclosure of matters occurring before a grand jury to the Internal Revenue Service for its use in conducting a civil tax investigation to determine liability and assess any tax deficiency constitutes disclosure directed "preliminarily to * * * a judicial proceeding" that may be authorized pursuant to Federal Rule of Criminal Procedure 6(e)(3)(C)(i) upon application to the court supervising the grand jury.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Federal Rules involved 2

Statement 4

Reasons for granting the petition 13

Conclusion 29

Appendix A 1a

Appendix B 27a

Appendix C 33a

Appendix D 49a

TABLE OF AUTHORITIES

Cases:

April 1977 Grand Jury Proceedings, In re, 506 F. Supp. 1174, appeal pending, No. 81-1182 (6th Cir.) 16

Baker v. *Carr,* 369 U.S. 186 17

Bradley v. *Fairfax,* 634 F.2d 1126 21

December 1974 Term Grand Jury Investigation, In re, 449 F. Supp 743 .... 16, 24

Disclosure of Testimony Before the Grand Jury (Troia), In re, 580 F.2d 281 .... 18, 19, 21

Doe v. *Rosenberry,* 255 F.2d 118 .... 18-19, 22

Douglas Oil Co. v. *Petrol Stops Northwest,* 441 U.S. 211 23

FTC v. *Dean Foods Co.,* 384 U.S. 597 23

Grand Jury for the Northern District of Alabama (Drummond Coal Company), In re, No. 81-7076 (5th Cir. July 20, 1981) 16

Grand Jury Investigation, In re, 630 F.2d 996 14

Cases—Continued **Page**

Grand Jury Investigation of Uranium Industry, In re, [1979-2] Trade Cas. ¶ 62,798 .... 19, 20, 21
Grand Jury, Miscellaneous No. 979 (Northern District of Texas), In re, 583 F.2d 128 24
Grand Jury Subpoenas, April, 1978, at Baltimore, In re, 581 F.2d 1103, cert. denied *sub nom. Fairchild Industries, Inc.* v. *Harvey,* 440 U.S. 971 .... 16, 24
J. Ray McDermott & Co., In re, 622 F.2d 166.... 19, 20, 21
Judge Elmo B. Hunter's Special Grand Jury, In re, 667 F.2d 724 .... 15, 16, 17, 18, 19, 21
1978-1980 Grand Jury Proceedings, In re, 503 F. Supp. 47 16
Patrick v. *United States,* 524 F.2d 1109 16
Robert Hawthorne, Inc. v. *Director of Internal Revenue Service,* 406 F. Supp. 1098 .... 26, 27
SEC v. *Dresser Industries, Inc.,* 628 F.2d 1368, cert. denied, 449 U.S. 993 14
Special February 1971 Grand Jury, In re v. *Conlisk,* 490 F.2d 894 .... 18, 19
State of Illinois v. *Abbott & Associates, Inc.,* cert. granted, No. 81-1114 (Mar. 22, 1982) 13
United States v. *Bates,* 627 F.2d 349 21
United States v. *Interstate Dress Carriers, Inc.,* 280 F.2d 52 .... 5, 6, 12, 14
United States v. *Kordel,* 397 U.S. 1 26
United States v. *LaSalle National Bank,* 437 U.S. 298 28
United States v. *Procter & Gamble Co.,* 356 U.S. 677 26
United States v. *Sobotka,* 623 F.2d 764 18
United States v. *Stanford,* 589 F.2d 285, cert. denied, 440 U.S. 983 12
Upjohn Co. v. *United States,* 449 U.S. 383 23

Statutes and rules:

Clayton Act, Section 4F(b), 15 U.S.C. 15f(b) 13
Commodity Exchange Act, 7 U.S.C. 6c(a)(A) 4
Natural Gas Act, 15 U.S.C. 717 *et seq.* 20
  15 U.S.C. 717r 20
  15 U.S.C. 717s 20

Statutes and rules—Continued — Page

26 U.S.C. 6103 23
26 U.S.C. 6212 21
26 U.S.C. 6231 22
26 U.S.C. 7422 22
26 U.S.C. 7602 22
Fed. R. Crim. P.:
  Rule 6 25
  Rule 6(e) 2, 5, 7, 9, 13, 14, 16, 24, 27
  Rule 6(e)(2) 5, 10, 14, 15
  Rule 6(e)(3)(A)(i) 13, 15
  Rule 6(e)(3)(A)(ii) 15, 25
  Rule 6(e)(3)(B) 25
  Rule 6(e)(3)(C) 14
  Rule 6(e)(3)(C)(i) *passim*
  Rule 6(e)(3)(C)(ii) 15

Miscellaneous:

Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure* (Oct. 1981) 14, 17
123 Cong. Rec. 25193-25196 (1977) 27
H.R. 5864, 95th Cong., 1st Sess. (1977) 27
H.R. Rep. No. 95-195, 95th Cong., 1st Sess. (1977) 27
S. Rep. No. 95-354, 92d Cong., 1st Sess. (1977) 16, 26

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JAMES E. BAGGOT~~T~~

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* 1a-26a) is reported at 662 F.2d 1232 and the supplemental opinion of the court of appeals upon rehearing (App. B, *infra,* 28a-32a) is reported at 662 F.2d 1243. The memorandum opinion and order of the district court (App. C, *infra,* 33a-48a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 49a-50a) was entered on June 25, 1981, and a petition for rehearing was denied on November 20, 1981 (App. B, *infra*, 27a-28a). On February 10, 1982, Justice Stevens extended the time in which to file a petition for a writ of certiorari until April 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Criminal Procedure 6(e) provides in pertinent part:

> *Recording and Disclosure of Proceedings.*
>
> * * * * *
>
> (2) *General Rule of Secrecy.*—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.
>
> (3) *Exceptions.*
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall

> be made in such manner, at such time, and under such conditions as the court may direct.

* * * * *

STATEMENT

1. In May of 1976, a special federal grand jury convened in the Northern District of Illinois began to investigate certain commodity futures trading transactions on the Chicago Board of Trade and related criminal violations of the Commodities Exchange Act and Internal Revenue Code. During the course of that investigation (which was continued by a successor grand jury upon expiration of the term of the first grand jury), respondent, James E. Baggot, became a target of the investigation. He was interviewed by agents of the grand jury at his home and then subpoenaed to appear before the grand jury. When he responded to the subpoena, he consented to being interviewed by two Assistant United States Attorneys in lieu of appearing before the grand jury. During that interview and two subsequent meetings, respondent entered into an agreement to plead guilty to an information charging two misdemeanor violations of the Commodity Exchange Act, 7 U.S.C. 6c(a)(A). In conformity with that agreement, respondent subsequently appeared before the grand jury and read a statement which had been prepared by an Assistant United States Attorney. Thereafter, on June 24, 1977, respondent pled guilty to the information as agreed (App. A, *infra*, 1a-2a, 5a-6a; App. C, *infra*, 33a-34a).

On March 8, 1978, the United States Attorney filed a motion in the United States District Court for the Northern District of Illinois seeking an order permitting disclosure of documents that had been subpoenaed by the grand jury in its investigation of respondent, as well as grand jury transcripts, to the Internal Revenue Service ("the Service"), for its use in determining respondent's income tax liabilities. On June 4, 1978, the district court denied the government's motion without prejudice on dual grounds. First, the court determined that the government had failed to establish with the requisite particularity the Service's need for these materials. Second, the court held that disclosure to the Service of matters occurring before a grand jury for use in determination of income tax liabilities was not disclosure directed "preliminarily to * * * a judicial proceeding" within the meaning of Fed. R. Crim. P. 6(e)(3)(C)(i), and accordingly could not be justified under that exception to the general rule of secrecy (Fed. R. Crim. P. 6(e)(2)) applicable to grand jury materials (App. C, *infra*, 35a).

On June 22, 1978, the United States Attorney informed the court of his intention to provide the Service with access to certain documentary materials obtained or created during the grand jury investigation, explaining that, under the doctrine associated with *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960), they were not "matters occurring before the grand jury" and were accordingly outside the scope of Rule 6(e). Specifically, the government urged that respondent's prepared statement, an internal memorandum to files prepared by Assistant United States Attorney Scott Lassar reflecting the substance of his initial interview with respondent, and certain third party documents produced pursuant to grand jury subpoena—records of a commodity trading firm reflecting activity in accounts in Baggot's name—did not constitute matters occurring before the grand jury and thus might be turned over without an order under Rule 6(e)(3)(C)(i) (App. C, *infra*, 35a).[1] On October 25, 1978, however, the district court concluded that these materials were "matters occurring before a grand jury" and accordingly rejected the government's assertion that the materials sought could be released to the Service without a disclosure order pursuant to Rule 6(e)(3)(C)(i).

On December 6, 1978, the district court authorized the United States Attorney to disclose to the Examination Division of IRS certain matters already in the public record: the two-count information charging respondent, and transcripts of his plea and sentencing proceedings. After digesting this material, the Chief of the Examination Division wrote back to the United States Attorney. He stated that the information provided indicated that respondent had probably evaded his tax liabilities, but that additional information would be needed to determine the amount due and to build a case against respondent.[2] Specifically, the Chief of the Examination Division sought information that would identify those who made unreported cash payments to Baggot (see note 2, *infra*) and the commodity trading firms involved. Assuming from the materials in the public record that information of this character had been considered by the grand jury, the IRS requested that the United States Attorney seek any order necessary under Fed. R. Crim. P. 6(e) to authorize release of these materials. The Service explained that, because any disputed assessment of taxes due would eventuate in Tax Court proceedings initiated by respondent, disclosure to the Service for use in tax determination would be disclosure directed "preliminary to * * * a judicial proceeding," and could accordingly be approved by the court pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i) (see App. A, *infra*, 2a-4a n.4).

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[1] The district court's opinion states (App. C, *infra*, 35a), incorrectly we believe, that at this juncture the *Dress Carriers* exception was cited as the basis for disclosure of only the first two items. The discrepancy has no bearing on the issues in this case.

[2] The transcript of the plea proceedings revealed the government's charge that respondent had participated in rigged commodity trades designed to produce substantial paper losses, which he deducted in preparing his tax returns, while recovering a substantial portion of the artificial "losses" in unreported cash kickbacks from his trading partners.

On February 27, 1979, the United States Attorney again sought the district court's leave to release the requested information.[3] The government did not renew its contention that any of the materials sought were outside the veil of grand jury secrecy, but pressed its original contention that disclosure should be authorized pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i), because antecedent to a judicial proceeding (App. C, *infra*, 37a). This time the district court granted the disclosure motion, albeit on somewhat unexpected grounds. First, reconsidering sua sponte its earlier ruling, the court concluded that respondent's prepared statement (though not the transcript of its delivery to the grand jury), as well as Assistant United States Attorney Lassar's "memorandum to file," reflected government investigation independent of the grand jury. The court accordingly held, contrary to its earlier rulings, that these two items were not matters occurring before the grand jury, and could be disclosed to the Service even without a court order. The remaining items covered by the government's disclosure motion were found to be covered by the rule of grand jury secrecy (*id.* at 37a-42a).

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[3] In addition to the items covered by the government's June 22, 1978, application (see page 5, *supra*), the United States Attorney sought leave to disclose: a letter to respondent from the Pacific Trading Company showing his net profit for 1975, records of all 1975 commodity transactions for the accounts of three other individuals with a second commodity trading firm, transcripts of the grand jury testimony of four individuals (including those whose commodity accounts records were subpoenaed), and a report prepared at the close of the grand jury investigation by an IRS special agent, detailed to assist the grand jury in its probe of respondent, that summarized the investigation and the evidence (App. A, *infra*, 6a; App. C, *infra*, 36a).

The district court concluded that the balance of the materials sought by the Service could not be released on the authority of Rule 6(e)(3)(C)(i) (App. C, *infra*, 42a-47a). The court labeled the Service's contemplated use of the grand jury materials "simply administrative" (*id.* at 46a-47a), because no judicial proceeding could arise until the Service made a deficiency assessment that was contested by respondent in the Tax Court. The district court nevertheless granted the disclosure motion, invoking (*id.* at 47a) "my general supervisory powers over the grand jury to order disclosure of all of the materials." The court explained that, because of the plea agreement, disclosure would not prejudice respondent's interest in freedom from further prosecution. Suggesting that exercise of supervisory power was necessary to relieve the United States Attorney of permanent responsibility for custody of the grand jury materials (*id.* at 47a-48a), the court concluded that disclosure to the Service would be the "only useful disposition" of these materials (*id.* at 48a).

Respondent appealed. A stay of disclosure was granted during the pendency of the appeal. Respondent argued that all of the items at issue were subject to grand jury secrecy constraints; that disclosure to the Service was not disclosure directed "preliminarily to * * * a judicial proceeding"; that the government had, in any event, failed to show a particularized need justifying disclosure; and that the district court's resort to supervisory powers was improper. As appellee the government argued: (1) that none of the items in issue, except for the transcripts of grand jury testimony and portions of Special Agent's Report based thereon, are "matters occurring before the grand jury"; (2) that disclosure should have been authorized under Fed. R. Crim. P. 6(e)(3)(C)(i) because, as a practical matter, tax court proceedings were virtually certain to result from disclosure; (3) that the "particularized need" standard is inapplicable when the government seeks disclosure of grand jury materials; and (4) that the district court properly exercised its supervisory powers because, with the criminal proceeding closed, there was little further need for grand jury secrecy (App. A, *infra*, 7a-8a).

A divided court of appeals reversed. Initially, the court condemned the district court's resort to extra-statutory supervisory powers (App. A, *infra*, 9a-12a).[4] The court acknowledged that there may be situations in which the need for disclosure in the interests of justice may overcome the policy of grand jury secrecy, justifying relaxation of the strictures of Rule 6(e). The court concluded, however, that, at least on the record of this case, the Service's responsibility for determination of tax liabilities and collection of taxes does not meet that standard. The court of appeals also concluded that the rule of secrecy embodied in Fed. R. Crim. P. 6(e)(2) is applicable to essentially all of the materials in issue (App. A, *infra*, 12a-15a).[5] The court thus rejected the district court's characterization of the Lassar memorandum and respondent's prepared statement, reasoning that they are too closely linked to the grand jury process to escape the veil of secrecy.

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[4] Judge Pell, who dissented from the judgment in substantial part (App. A, *infra*, 20a-26a), concurred in this aspect of the majority opinion (*id.* at 20a).

Finally, the court of appeals agreed (App. A, *infra*, 15a-19a) with the district court that disclosure of grand jury material to the Service for tax determination would not be disclosure directed "preliminarily to * * * a judicial proceeding" and accordingly could not be authorized under Fed. R. Crim. P. 6(e)(3)(C)(i). The court of appeals explained (App. A, *infra*, 16a) that "the present Internal Revenue Service civil investigation of Baggot's possible additional tax liabilities is too embryonic, speculative and uncertain to firmly say that it is 'preliminarily to' a judicial proceeding."[6]

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[5] Although the majority made no specific mention of the statements reflecting commodity transactions or the letter to respondent (see page 5 & note 3, *supra*), which, the government had argued, were not matters occurring before the grand jury at all, these were clearly covered by its ruling. The court of appeals did concede that upon remand portions of the special agent's summary report (see note 3, *supra*) sought by the IRS might be disclosed, insofar as they were demonstrated to rest on sources outside the grand jury investigation.

[6] Because of this disposition, the court of appeals did not address the standard to be applied to government disclosure requests under Rule 6(e)(3)(C)(i)—a question that is presented by our pending petition in *United States* v. *Sells Engineering, Inc.*, No. 81-1032. (filed Dec. 2, 1981). (See note 7, *infra*.)

In dissent, Judge Pell reasoned (App. A, *infra*, 21a-22a) that litigation in the Tax Court was so probable a consequence of the requested disclosure of documents, that their disclosure would be directed "preliminarily to * * * a judicial proceeding" within the meaning of Rule 6(e)(3)(C)(i). Judge Pell rejected the majority's premise that judicial proceedings must be a virtual certainty before disclosure may be secured under the Rule. But even applying that standard, he concluded that disclosure to the Service was authorized (App. A, *infra*, 21a-22a):

> It is true, of course, as the majority states, that the option of litigation rests with the taxpayer who may wish to pay any deficiency assessed if one is even assessed. From the vigorous manner in which the present litigation is being pursued, I would find more certainty in the likelihood of ultimate judicial proceedings than does the majority. In any event, the actual beginning of litigation is always an uncertain matter which may be deferred or even never begun for any of several reasons. If we read into the rule that the disclosure preliminarily to a judicial proceeding must be preliminarily to a judicial proceeding bound to happen, we substantially are curtailing the plain language of the rule in a situation such as the present where there has been a guilty plea to an information charging an understatement of taxable income of approximately $60,000. It would not seem to characterize correctly the likelihood of ultimate vigorous pursuit of civil liability by the Internal Revenue Service as being "embryonic, speculative and uncertain," In sum, on this point, it appears to me from the facts of this case that there is reasonable certainty that a judicial proceeding will follow but that even if this was not a practical certainty

> under the plain wording of the rule of disclosure the Internal Revenue Service was entitled to disclosure of the items it sought.

Judge Pell also dissented on the independent ground that, under *United States* v. *Interstate Dress Carriers*, *supra*, and the Seventh Circuit's own decision in *United States* v. *Stanford*, 589 F.2d 285 (1978), cert. denied, 440 U.S. 983 (1979), the Lassar memorandum and the commodity trading company records showing fraudulent transactions, were not matters occurring before the grand jury subject to grand jury secrecy constraints (App. A, *infra*, 20a, 22a-25a).

The government sought rehearing, suggesting en banc review. The petition was denied (App. B, *infra*, 27a-28a), with two judges voting for en banc review. Both the panel majority and Judge Pell, however, issued supplemental opinions upon the denial of rehearing (App. B, *infra*, 28a-32a), each addressing only the *Interstate Dress Carriers* issue. The majority denied that it had established any firm rule that "all third party documents subpoenaed by a grand jury thereby forever after acquire immunity from any other use" (*id.* at 30a), stating that (*ibid.*):

> [o]nly those subpoenaed documents should be subject to Rule 6(e) which when reasonably considered in the context of the particular grand jury investigation are determined by the trial court to reveal some secret aspect of the investigation.

However, rather than explain why this standard required denial of disclosure in this case, the court of appeals simply observed that the district court had examined the documents *in camera* and added (*id.* at 29a):

> As he was thoroughly familiar with the grand jury proceedings, we see no justification for disputing his view of those documents.

Judge Pell adhered to and restated his grounds for dissent (*id.* at 31a-32a).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning Rule 6(e) of the Federal Rules of Criminal Procedure, which governs disclosure of matters occurring before a grand jury.[7] The court of appeals has held that grand jury material may not be released to the Internal Revenue Service for civil tax investigation and enforcement pursuant to Rule 6(e)(3)(C)(i), which permits the disclosure of "matters occurring before the grand jury * * * when so directed by the court preliminary to * * * a judicial proceeding." This decision conflicts with a recent decision of another court of appeals and, unless overturned, will substantially and adversely affect the Internal Revenue Service's ability to fulfill its statutory mandate to investigate, determine tax liabilities, and collect taxes determined to be owing.[8]

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[7] We note the pendency before the Court of two other cases presenting significant issues pertaining to grand jury secrecy. *State of Illinois* v. *Abbott & Associates, Inc.*, cert. granted, No. 81-1114 (Mar. 22, 1982), presents, *inter alia*, the question whether Section 4F(b) of the Clayton Act, 15 U.S.C. 15f(b), authorizes disclosure to state attorneys general of grand jury materials relating to antitrust investigations pursuant to Rule 6(e)(3)(C)(i) on less than a showing of particularized and compelling need. *United States* v. *Sells Engineering, Inc.*, cert. pending, No. 81-1032 (filed Dec. 2, 1981), presents the question whether Rule 6(e)(3)(A)(i) authorizes disclosure of grand jury materials—without a court order—to Justice Department attorneys engaged in evaluating or preparing civil False Claims Act litigation. *Sells* also presents the question whether disclosure to government personnel as to whom leave of court is required must rest upon a showing of particularized and compelling need. (See note 6, *supra.*)

1. Rule 6(e) of the Federal Rules of Criminal Procedure codifies the traditional rule that grand jury proceedings should be kept secret. The rule

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[8] We do not seek review of the court of appeals' conclusion that the district court's exercise of supervisory power was unwarranted on the facts of this case.

Similarly, although there is much force to Judge Pell's contention that certain of the items in dispute are not "matters occurring before the grand jury" within the meaning of Fed. R. Crim. P. 6(e)(2), we are not seeking review of this aspect of the majority's decision. The *Dress Carriers* issue may well require review in a future case, for, as the court of appeals appears to have recognized (App. A, *infra*, 29a), it is difficult to reconcile its analysis of that issue with the decisions of other courts of appeals. Compare, *e.g.*, *In re Grand Jury Investigation*, 630 F.2d 996, 1000-1001 (3d Cir. 1980); *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1382-1383 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); *United States* v. *Interstate Dress Carriers, Inc.*, *supra*, 280 F.2d at 54. We note, however, that the court of appeals disclaimed any intention to establish a general rule barring disclosure of grand jury documents (App. A, *infra*, 11a; App. B, *infra*, 30a & n.1). Furthermore, the Judicial Conference's Advisory Committee on the Federal Rules of Criminal Procedure has currently proposed amendments to Rules 6(e)(2) and 6(e)(3)(C) to clarify the status of documents that are subpoenaed by, or submitted to, a grand jury. Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure* 13-15, 18, 20-22 (Oct. 1981). For convenience we hereafter refer to all of the materials sought by the IRS in this case as "grand jury materials."

prohibits disclosure of "matters occurring before the grand jury" by anyone (other than a witness) having access to the grand jury proceedings, including grand jurors, transcribers and reporters, attorneys for the government and agents of the grand jury. Fed. R. Crim P. 6(e)(2). The rule permits disclosure of "matters occurring before the grand jury," *inter alia*, "when so directed by a court preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i).[9] The decision of the court of appeals that release of grand jury material to the IRS Examination Division for a determination of respondent's tax liability and collection of a deficiency would not be disclosure directed "preliminarily to * * * a judicial proceeding" is squarely contrary to a subsequent decision of the United States Court of Appeals for the Eighth Circuit, *In re Judge Elmo B. Hunter's Special Grand Jury*, 667 F.2d 724 (1981). Although aware of the Seventh Circuit's decision in this case, the Eighth Circuit found Judge Pell's reasoning in dissent more persuasive, relying upon it and quoting from it extensively. *Id.* at 727.[10] This acknowledged conflict of appellate decisions clearly warrants this Court's review because of the importance of maintaining uniform procedures nationwide in the administration of the internal revenue laws.[11]

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[9] The rule also permits disclosure without a court order to an attorney for the government for use in the performance of such attorneys' duties (Rule 6(e)(3)(A)(i)) (see note 7, *supra*) and to such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duties to enforce federal criminal law (Rule 6(e)(3)(A)(ii)). Disclosure may also be made under the rule when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury (Rule 6(e)(3)(C)(ii)).

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[10] The conflict of authority concerns an issue that arises frequently. Consistent with the Eighth Circuit's decision is *In re Grand Jury Subpoenas, April, 1978, at Baltimore*, 581 F.2d 1103, 1110 (4th Cir. 1978), cert. denied *sub nom. Fairchild Industries Inc.* v. *Harvey*, 440 U.S. 971 (1979), citing with approval *In re December 1974 Term Grand Jury Investigation*, 449 F. Supp. 743 (D. Md. 1978). See also *Patrick* v. *United States*, 524 F.2d 1109, 1117 (7th Cir. 1975).

On the other hand, two district courts within the Sixth Circuit have reached a contrary result, consistent with the decision below. *In re April 1977 Grand Jury Proceedings*, 506 F. Supp. 1174 (E.D. Mich. 1981), appeal pending, No. 81-1182 (6th Cir.); *In re 1978-1980 Grand Jury Proceedings*, 503 F. Supp. 47 (N.D. Ohio 1980). In an unpublished decision the Fifth Circuit has summarily affirmed a sealed district court order that barred release of grand jury material sought by the IRS for use in a civil tax investigation. *In re Grand Jury for the Northern District of Alabama* (*Drummond Coal Company*), No. 81-7076 (July 20, 1981). Finally, as is explained in our reply brief in *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (see note 7, *supra*), a copy of which has been served upon counsel for respondent, it is possible that this issue will be reached in *Sells* v. *United States*, No. 80-5829 (9th Cir., argued Mar. 2, 1982).

[11] This case presents an especially appropriate occasion for the Court to consider the issue presented. The Eighth Circuit's decision in *In re Judge Elmo B. Hunter's Special Grand Jury*, *supra*, reversed a district court's denial of an ex parte motion for disclosure to the I.R.S. pursuant to Rule 6(e)(3)(C)(i). The legislative history of that Rule reveals Congress' intention that hearing on such disclosure applications be ex parte. S. Rep. No. 95-354, 92d Cong., 1st Sess. 8 (1977). Moreover, the Judicial Conference's Advisory Committee on the Federal Rules of Criminal Procedure has proposed to amend Rule 6(e) to make explicit the requirement that re-

2. The Eighth Circuit's decision is correct. The contrary decision of the court below is based upon an unreasonably narrow reading of the language of Rule 6(e)(3(C)(i) and is contrary to the legislative history underlying the Rule.

a. As Judge Pell observed in his dissent (App. A, *infra*, 21a), the decision below "fails to give any real recognition to the word 'preliminarily' in the rule of disclosure." Rule 6(e)(3(C)(i) permits disclosure of grand jury material when directed by a court in either of two situations: "in connection with a judicial proceeding" or "preliminarily to * * * a judicial proceeding." If, as the court of appeals assumed, the "preliminarily to" branch of the rule applies only to situations in which litigation is essentially certain to occur it is mere surplusage. First, disclosure in such situations could be directed by the court as disclosure "in connection with a judicial proceeding," for that branch of the rule does not require that the judicial proceeding be already pending. Second, there are always contingencies—both foreseeable and unforeseeable—that may intervene to avert liti-

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quests for disclosure by the government be made on an ex parte basis. Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure* 15, 25 (Oct. 1981). Wherever this practice is followed, only the government is in position to secure appellate review of a lower court decision. There was, for instance, essentially no opportunity to file a petition for a writ of certiorari to review the decision in *In re Judge Elmo B. Hunter's Special Grand Jury*, *supra*, and it appears that the time for filing such a petition has expired. On the other hand, a case, such as the instant one, where, for whatever reason, notice was given to respondent of the disclosure application, provides an opportunity for resolution of the important question presented in a fully adversary setting. Cf. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

gation whenever disclosure of grand jury material is sought as an antecedent to contemplated litigation. As Judge Pell emphasized (App. A, *infra*, 21a), "the actual beginning of litigation is always an uncertain matter * * *." Thus, if virtual certainty of litigation is the test, the "preliminarily to" branch of Rule 6(e)(3(C)(i) would have no practical application.

The court of appeals' conclusion that the possibility of litigation here is "too embryonic, speculative and uncertain to firmly say that [disclosure would be directed] 'preliminarily to' a judicial proceeding" (App. A, *infra*, 16a), rests upon the observations that the Service has yet to assess any deficiency against respondent, and that, when such a deficiency is assessed, respondent may choose to pay it rather than contest it by litigation in the Tax Court (*id.* at 15a). But these factors do not distinguish the Service's proposed tax investigation of respondent from other situations in which disclosure has been authorized preliminarily to a judicial proceeding. As the Eighth Circuit observed in *In re Judge Elmo B. Hunter's Special Grand Jury*, *supra*, 667 F.2d at 728, the courts of appeals have generally approved the disclosure of grand jury materials to attorney disciplinary bodies, judicial conduct commissions, and police boards of inquiry, "on the theory that the scheme under which such [investigatory] action is taken is designed to culminate in, or clearly contemplates a judicial proceeding" or makes provision for judicial review. See, *e.g.*, *United States* v. *Sobotka*, 623 F.2d 764, 766 (2d Cir. 1980); *In re Disclosure of Testimony Before the Grand Jury* (*Troia*), 580 F.2d 281, 285-286 (8th Cir. 1978) (hereinafter "*Troia*"); *In re Special February 1971 Grand Jury* v. *Conlisk*, 490 F.2d 894, 896-897 (7th Cir. 1973) (hereinafter "*Conlisk*"); *Doe* v.

Rosenberry, 255 F.2d 118, 119-120 (2d Cir. 1958). As the Eighth Circuit observed (*In re Judge Elmo B. Hunter's Special Grand Jury, supra*, 667 F.2d at 728):

> In none of these cases can it be said with any certainty that a judicial proceeding will occur. The investigating authority may conclude there has been no wrongdoing, or the subject of the investigation may not contest the adverse action. * * * [T]here is no substantial difference from the IRS civil assessment situation.[12]

The court of appeals also relied upon *In re J. Ray McDermott & Co.*, 622 F.2d 166 (5th Cir. 1980) (hereinafter "*McDermott*"); and *In re Grand Jury Investigation of Uranium Industry*, [1979-2] Trade Cas. ¶ 62,798 (D.D.C. 1979) (hereinafter "*Uranium Industry*"). These cases are

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[12] The court below sought to distinguish *Conlisk, supra*; and *Troia, supra*, but the attempted distinctions do not withstand analysis. The court noted that in *Conlisk* the statutory procedure provided a policeman charged with an offense by a disciplinary board with the right to initiate judicial review (App. A, *infra*, 16a). But the respondent taxpayer has the right to plenary redetermination of his tax liability in the Tax Court. And in *Conlisk* the court deemed it immaterial that the burden of initiating litigation was placed upon the individual officer charged (49 F.2d at 897), as it is here, and even that sanctions were made effective prior to judicial review—an attribute which a tax audit lacks. The court below also noted (App. A, *infra*, 16a) that the disciplinary proceeding itself in *Conlisk* had certain quasi-judicial attributes. But, as is explained above, disclosure directed preliminarily to a judicial proceeding necessarily embraces proceedings that are not themselves judicial. The court below distinguished *Troia, supra*, only by remarking (App. A, *infra*, 17a): "Obviously, there is some flexibility evident in what may be viewed as qualifying for the exception, but the rule is not so flexible as to cover the present Internal Revenue Service administrative interest in the taxes of Baggot."

The statutory scheme designed by Congress for the ascertainment, assessment and collection of taxes is designed to culminate in judicial proceedings when-

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distinguishable, but serve to underscore the pervasive confusion surrounding Rule 6(e)(3)(C)(i). In *McDermott* the court of appeals reversed a district court order directing disclosure of grand jury materials to the Federal Energy Regulatory Commission (FERC). FERC sought disclosure for an administrative investigation of the possibility that interstate natural gas pipeline companies subject to its jurisdiction had exacted overcharges in violation of the Natural Gas Act, 15 U.S.C. 717 *et seq.* The subject of the grand jury investigation, however, was not pipeline overcharges, but price-fixing in the marine construction industry in violation of the Sherman Act—which is not subject to FERC jurisdiction. FERC's interest in the grand jury proceedings rested entirely upon the supposition that any overcharges suffered by the pipelines as a result of marine-construction bid-rigging might have been passed on to pipeline customers. 622 F.2d at 168-169. The court rejected FERC's contentions that the requested disclosure was preliminary to court of appeals' review of an administrative determination by FERC (pursuant to 15 U.S.C. 717r) or a district court enforcement action initiated by FERC (pursuant to 15 U.S.C. 717s). The court found the nexus between the administrative proceeding and the judicial proceedings too attenuated to permit disclosure. 622 F.2d at 171. Without conceding that *McDermott* was correctly decided, we deem it significant that the Fifth Circuit relied heavily upon FERC's apparent indisposition to actually initiate a judicial proceeding. See 622 F.2d at 171. Moreover, the relationship between the subject of the grand jury proceedings, on the one hand, and the contemplated administrative proceedings and succeeding judicial ones, on the other, in *McDermott* was rather remote. By contrast, as is explained in the text (pages 20-22, *infra*), the relationship between the grand jury proceedings, the Service's proposed investigation and the Tax Court proceedings likely to ensue is close and direct.

Uranium Industry, supra is readily distinguishable. There disclosure was sought only by a congressional committee for ever necessary to resolve civil tax disputes. The Internal Revenue Code provides that when the Service determines a deficiency in tax, the proceedings to settle that deficiency are begun by giving the taxpayer notice of that deficiency. 26 U.S.C. 6212. Upon receipt of such a notice, the taxpayer's options are to accede to the alleged deficiency either affirmatively (by payment) or by inaction (which enables the government to take judicial action to enforce the deficiency as though it were a default judgment), to negotiate a settlement, or, if no settlement can be reached, to initiate judicial proceedings to resolve

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investigatory purposes. The court specifically distinguished disclosure to IRS for civil tax investigations [1979-2] Trade Cas. ¶ 62,798, at 78,643), stating only that disclosure was to be denied where "the likelihood of a court's involvement is either highly remote or non existent."

Like *McDermott, supra,* other cases in which disclosure has been denied because insufficiently related to a contemplated judicial proceeding are distinguishable, but highlight the need for further review. *Bradley* v. *Fairfax,* 634 F.2d 1126, 1128-1129 (8th Cir. 1980), treats disclosure of grand jury material to the United States Parole Commission as harmless error. In dictum, or what was at most an alternative holding, the court suggested that judicial review of parole commission determinations was sufficiently limited and independent of the parole commission proceeding to make Rule 6(e)(3)(C)(i) inapplicable, thereby distinguishing the cases cited in the text. 634 F.2d at 1129. The panel also questioned the decision in *Troia, supra,* 634 F.2d at 1129 n.6. The subsequent decision in *In re Judge Elmo B. Hunter's Special Grand Jury, supra,* however, reveals the continuing vitality of *Troia.* Finally, *United States* v. *Bates,* 627 F.2d 349 (D.C. Cir. 1980), may be distinguished in the same fashion as *McDermott, supra.* In any event, *Bates* may be read to approve disclosure to the IRS, at least in certain circumstances, or is at the least ambiguous on this point. 627 F.2d at 351 & n.1.

the dispute either in the United States Tax Court or (if payment of a deficiency is first made) in the United States District Court or the Court of Claims (26 U.S.C. 6213, 7422). In any judicial proceedings, the dispute in its entirety is "determinable by a court." *Doe* v. *Rosenberry*, *supra*, 255 F.2d at 120. These judicial proceedings are plenary, and are in no respect limited by the prior administrative proceedings. Accordingly, disclosure of grand jury materials to the IRS in the circumstances of the case is authorized by Rule 6(e) (3(C) (i).[13]

The court of appeals' interpretation of Rule 6(e) (3) (C) (i) would strip it of all utility in the area of tax enforcement, for the Service cannot make a determination of any tax deficiency (thereby prompting the initiation of litigation) without pertinent information necessary to establish the amount of, and show the existence of, the deficiency. Thus, to allow disclosure only at the juncture when litigation is a certainty would be a meaningless formality. By that time IRS would either have gained the necessary evidence by some other means, or in some instances, would have had to abandon the effort to assess taxes that are owing. The language of the rule does not require this absurd result. Significantly, in an analogous situation, the government conceded, and this Court agreed, that the work-product doctrine, ordinarily framed in terms of materials prepared by counsel in anticipation of litigation, may be asserted in response to IRS summonses issued pursuant to 26 U.S.C. 7602, even though no litigation is pending and it is not certain that litigation will ensue. *Upjohn Co.* v. *United States*, 449 U.S. 383, 397-398 (1981). Just as the policy underlying the work product doctrine required, as a practical matter, that it extend to material sought by IRS summonses, similar practical considerations dictate that the policy underlying Rule 6(e)(3)(C)(i) not be undercut by the fact that under the statutory scheme civil tax litigation ensuing from an IRS investigation is ordinarily initiated by the taxpayer.[14]

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[13] As Judge Pell observed (App. A, *infra*, 21a-22a; see pages 11-12, *supra*), the particular facts of this case make it especially clear that the requested disclosure could properly be deemed directed "preliminarily to * * * a judicial proceeding."

We do not suggest that there are no limits on disclosure preliminary to a judicial proceeding. Whenever disclosure is sought under Rule 6(e)(3)(C)(i), the party requesting disclosure must establish that its need for the information outweighs the public interest in grand jury secrecy. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). This requirement eliminates the possibility that disclosure to the public generally will be permitted under the rule we advocate.[15] Nor will release to the IRS upon an appropriate showing encourage grand jury abuse, for the government will still be required to show that the grand jury had been utilized in good faith and not simply to gather information for civil purposes. *In re December 1974 Term Grand Jury Investigation*, 449 F. Supp. 743 (D. Md. 1978). See also *In re Grand Jury, Miscellaneous No. 979 (Northern District of Texas)*, 583 F.2d 128, 131 n.2 (5th Cir. 1978); *In re Grand Jury Subpoenas, April, 1978, at Baltimore*, 581 F.2d 1103, 1109-1110 (4th Cir. 1978), cert. denied *sub nom. Fairchild Industries Inc.* v. *Harvey*, 440 U.S. 971 (1979).[16]

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[14] Cf. also *United States* v. *New York Telephone Co.*, 434 U.S. 159, 171-178 (1977); *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966).

[15] We note, as well, that disclosure to the Internal Revenue Service will not result in public dissemination of grand jury material. 26 U.S.C. 6103 prohibits the Internal Revenue Service from disclosing to the public information pertaining to taxpayers.

b. The decision below is contrary to legislative history revealing that Congress intended that Rule 6(e)(3)(C)(i) reach not only circumstances in which judicial proceedings are in being or are certain to ensue, but also situations where judicial proceedings are a routine sequel to an administrative process, and are prescribed by the relevant statutory scheme as the means for final determination of rights and liabilities. Specifically, the legislative history underlying 1977 Amendments to Rule 6(e) reflects Congress' understanding that disclosure of grand jury material may be made for use in a civil tax investigation.

In 1977, Rule 6(e) was amended to permit government attorneys acting without any court order to disclose grand jury materials to agency personnel, such as Internal Revenue Service agents, who are needed to assist such attorneys in grand jury proceedings and criminal law enforcement.[17] While the language at issue here was not altered by the 1977 Amendment to the rule,[18] the Senate Report on the 1977 Amendment, S. Rep. No. 95-354, 95th Cong., 1st Sess. (1977), reflects approval of court-ordered disclosure to agencies outside the Justice Department for civil law enforcement use. The Report explained (*id.* at 8) that potential misuse of the grand jury would be prevented by requiring that a court order authorizing disclosure be obtained, but emphasized (*ibid.*):

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[16] As noted above (page 13 note 7), the nature of the showing is a question presented by the government's petition for a writ of certiorari in *United States* v. *Sells Engineering, Inc.*, No. 81-1032.

> There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming the grand jury was utilized for the legitimate purposes of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions. [Footnote omitted.]

In emphasizing its intention that disclosure under Rule 6(e)(3)(C)(i) be permitted at least as liberally as the prevailing court decisions at the time allowed, the Senate Committee cited *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), and *Robert Hawthorne, Inc.* v. *Director of Internal Revenue Service*, 406 F. Supp. 1098 (E.D. Pa. 1976). S. Rep. No. 95-354, *supra*, at 8 n.13. The former decision did not present any question concerning disclosure of grand jury materials to federal agency personnel. In *Hawthorne*, however, the court discussed the issue in the context of approving disclosure to Internal Revenue Service agents whose assistance was required by the United States Attorney in presenting a criminal case to the grand jury. The court's order did not prohibit the Internal Revenue Service agents from "utilizing [the] materials in the course of their official duties, for either criminal or civil purposes," so long as the materials remained under the aegis of the United States Attorney. 406 F. Supp. at 1113. And, although the question was not squarely presented, the court also indicated that once the grand jury proceedings had been concluded, there was no bar to the use of grand jury materials by the Internal Revenue Service, stating that it saw no merit "to plaintiff's contention that no civil use may ever be made of the subpoenaed material," and affirming that, "so long as the government did not act in bad faith [by misusing the grand jury as a subterfuge for a civil investigation], ultimate civil use is proper." *Id.* at 1119 n.35. The court explicitly recognized that once an agency such as the Internal Revenue Service has terminated its role in a grand jury investigation, it may properly petition a court for disclosure of grand jury materials under Rule 6(e) preliminarily to, or in connection with, a judicial proceeding. 406 F.Supp. at 1129 n.62. Cf. *United States* v. *Kordel*, 397 U.S. 1, 11-13 (1970).

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[17] The 1977 Amendments, *inter alia,* added the present subsections (e)(3)(A)(ii) and (e)(3)(B) to Rule 6.

[18] The court of appeals erroneously stated that the "preliminarily to" language was added to Rule 6 in 1977 (App. A, *infra,* 3a-5a). In fact, that language was part of the rule when it was first promulgated in 1946. As respects this lanugage, the 1977 Amendment merely reorganized the text of the Rule, setting out the "preliminarily to" provision as part of a separate subsection of the rule.

The Senate Committee's citation of *Hawthorne* may properly be taken as an indication of the views of Congress as a whole. Prior to Senate action, the House of Representatives had disapproved the amendment to Rule 6(e) formulated by the Advisory Committee on Crminal Rules of the Judicial Conference, without adopting any substitute. H.R. Rep. No. 95-195, 95th Cong., 1st Sess. 3-5 (1977), accompanying H.R. 5864, 95th Cong., 1st Sess. (1977). The Senate, however, reformulated the Rule into its present form. After receiving a complete explanation of the effect of the Senate provisions the House acquiesced in the Senate amendment to the bill. 123 Cong. Rec. 25193-25196 (1977). In his explanation, Representative Wiggins of the House Judiciary Committee spcifically noted the issues raised by the use of IRS agents as agents of the grand jury. *Id.* at 25196. Representative Wiggins affirmed that under the rule as amended this practice would continue to be lawful. *Ibid.* He added that (*ibid.*):

> The practical effect of the Senate amendment to rule 6(e) is that a Government agent receiving grand jury information from an attorney for the Government becomes, to that extent, an employee of the grand jury. He is not free to share such information within the agency which directly employs him, even though it might be useful and relevant to the mission of that agency. Materials produced before a grand jury must be held secret by that grand jury and, must remain within the control of the Attorney General or his assistants, or the U.S. attorney or his assistants, to be used by them in the performance of their duties.

In closing, however, Representative Wiggins made it clear that these constraints were inapplicable so long as leave of court for disclosure was sought (*ibid.*; emphasis added):

> There will come a time when a grand jury uncovers violations of civil laws, or State or local laws. It then becomes the duty of the attorney for the Government, if he or some other attorney for the Government cannot act on that information, to turn it over *to the appropriate governmental agency so that such agency can do its duty.* However, the attorney for the Government may do this only after successfully seeking an order of the court.

In light of this clear legislative history, including explicit mention of the role of IRS agents, the court of appeals seriously erred in characterizing (App. A, *infra*, 18a) this legislative history as irrelevant to the issue presented here.

3. Thus, the 95th Congress clearly intended that disclosure pursuant to Rule 6(e)(3)(C)(i) be available in the circumstances of this case. The contrary decision of the court below has substantial potential for impeding the enforcement of the federal tax laws. As the Court recognized in *United States* v. *LaSalle National Bank*, 437 U.S. 298, 311-312 (1978), "the Government does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins." Yet, under the decision below, instances may well arise in which the Service is generally aware of the existence of a tax delinquency, but is unable to recoup the deficiency because information needed to establish and prove the liability cannot be disclosed to the Internal Revenue Service, the agency charged by Congress with the duty of enforcing the federal tax laws, and is, as a practical matter, otherwise unavailable. Rule 6(e)(3)(C)(i) does not command any such anomalous result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1982

Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1999

IN RE: THE SPECIAL FEBRUARY, 1975 GRAND JURY
THE SPECIAL APRIL, 1977 GRAND JURY

Appeal of: JAMES E. BAGGOT

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 76-GJ-534—James B. Parsons, *Judge*

ARGUED FEBRUARY 10, 1981—DECIDED JUNE 25, 1981

Before PELL, *Circuit Judge*, MARKEY, *Chief Judge*,[*] and WOOD, *Circuit Judge*.

WOOD, *Circuit Judge*. The disclosure of grand jury related materials is the isue. Respondent James E. Baggot became one of the targets of the Special February, 1975 Grand Jury which continued with the Special April, 1977 Grand Jury in an investigation of commodities futures trading on the Chicago Board of Trade.[1] No indictment resulted against Baggot, but in accordance with a plea agreement, Baggot pleaded guilty to a two count information charging him with engaging in rigged commodity trades, misdemeanor violations under the Commodities Exchange Act.[2] Subsequently, the Internal Revenue Service ("IRS") sought certain evidence generated by the grand jury investigation to assist its determination of Baggot's civil tax liability.[3] After two prior unsuccessful attempts to secure the district court's approval of the request, the United States Attorney on February 27, 1979 filed another motion, based on a letter from the Internal Revenue Service[4] seeking authority to disclose certain materials to IRS "for use preliminarily to or in connection with judicial proceedings relating to the civil tax liability" of Baggot. The motion seeks

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[*] The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

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[1] Numerous indictments in the Northern District of Illinois resulted against commodity traders charging violations of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, Internal Revenue laws, in addition to conspiracy and mail fraud violations.

[2] 7 U.S.C. § 6c(a)(A). The government claims the purpose of the rigged trades was to evade income taxes. By the scheme, the government explains, Baggot intentionally sustained losses which he deducted in full on his tax returns. However, Baggot recovered part of the loss as a cash kickback which he did not report. He was fined $30,000 and placed on probation for one year.

[3] This civil situation is to be distinguished from disclosure to Internal Revenue agents who are assisting the United States Attorney in the presentation of the criminal case to the grand jury under Fed. R. Crim. P. 6(e)(A)(3)(ii). *United States* v. *Thomas*, 593 F.2d 615, 623, *modified on rehearing on other grounds*, 604 F.2d 450 (5th Cir. 1979) (per curiam).

[4] The letter from the Chief of the Examination Division of IRS referring to copies of certain proceedings in open court in Baggot's criminal case with which IRS had been supplied, stated in part:

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* * *

> The documents do not contain the names or statements of individuals who returned the cash to BAGGOT, nor do they identify the commodity firms which had prepared the records concerning the fraudulent trades of BAGGOT or if there were any other fraudulent losses or unreported income which could be used to determine the correct tax liability of BAGGOT for 1975.
>
> Therefore, I am requesting that a Rule 6(E) order for civil purposes be obtained for 1975 due to the following reasons: (1) to obtain the information and documents which would be needed to determine the correct liability of BAGGOT for 1975; (2) the names and statements of the witnesses and the documents prepared by the commodity firms in order to substantiate the civil fraud penalty; (3) if a Rule 6(E) order is not obtained a substantial amount of tax revenue would not be collected; and (4) the statements of the witnesses and the documents would be needed in a judicial proceeding if the taxpayer does not agree to the additional tax being assessed.
>
> The judicial proceeding as mentioned in item four pertains to Tax Court proceedings. When a taxpayer does not agree with Revenue Agent's tax adjustments and after a statutory notice has been issued, the taxpayer will petition the Tax Court for judicial determination. It is our belief that the Internal Revenue Service procedures which provide that every non-agreed case goes to the Tax Court for settlement (unless the taxpayer decides to agree at any stage of the legal proceedings) constitutes a judicial proceeding within the meaning of the Federal Rules of Criminal Procedure and in particular Rule 6(E)(C). The point being that if we do not have the necessary information preliminary to the Tax Court docketing, under IRS procedures we cannot go forward with our position to the Tax Court.
>
> In order to prove the tax adjustments based upon fraudulent trades and to sustain the fraud penalty the evidence

to take advantage of an exception added in 1977 to the general rule of secrecy required by Rule 6(e)(2) Fed. R. Crim. P.[5] *See* Pub. L. 95-78, § 2, 91 Stat.

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must be clear and convincing. The evidence in the instant case which would be required is the statements of the witness and all pertinent trading records. If the Rule 6(E) order is not obtained the civil adjustments would be based solely upon the information document and limited court proceedings. These documents would be insufficient to sustain the tax adjustments and fraud penalty in Tax Court proceedings.

[5] Rules 6(e)(2) and 6(e)(3) Fed. R. Crim. P. provide in part:

> (e) *Recording and Disclosure of Proceedings.*
>
> (2) *General Rule of Secrecy.*—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.
>
> (3) *Exceptions.*
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand jury, may be made to—
>
> > (i) an attorney for the government for use in the performance of such attorney's duty; and
> >
> > (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.
>
> (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize

319. That exception, Rule 6(e)(3)(C)(i), permits disclosure of matters occurring before the grand jury with court approval "preliminarily to or in connection with a judicial proceeding."

Background

Before examining the specific items sought to be disclosed, some additional background must be explained. In May 1977, two IRS agents called on Baggot at his home, questioned him and then served him with a grand jury subpoena requiring his appearance before the Special April, 1977 Grand Jury on May 4, 1977. In accordance with the subpoena, Baggot appeared at the office of the United States Attorney. Baggot was advised by an Assistant United States Attorney that if he would tell the

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that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

truth he would not have to appear before the grand jury, but instead would be interviewed by the Assistant United States Attorney. Baggot consented and made admissions of wrongdoing to the Assistant United States Attorney. When leaving Baggot was advised "to get a lawyer," which he did. After the interview, Assistant United States Attorney Lassar, who was present at the interview, prepared a Memorandum to File" which is one of the items now sought to be disclosed.

After Baggot secured counsel the plea negotiations began which led to his misdemeanor guilty plea. As part of those negotiations a statement was prepared by the government which Baggot agreed to read to the grand jury on June 8, 1977. The statement would constitute his only testimony before the grand jury. That statement which was read as agreed is also sought to be disclosed.

In addition to those two items, the following specific materials are also sought to be disclosed: a letter to Baggot from Pacific Trading Company showing his net profit for the year 1975; all purchase and sale statements for accounts 21, 22, 4100 and 4101 in the name of James Baggot at Pacific Trading Company for the year 1975; all purchase and sale statements at Central Soya, Inc. for account 509 of James Kerrins, account 608 of Katherine Michalski and account 605 of Guenther Kromminga for the year 1975, transcripts of the grand jury testimony of Robert Meyer, James Kerrins, Katherine Michalski and Guenther Kromminga; and the IRS Special Agent's Report on Baggot.[6]

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[6] The materials sought to be disclosed as listed have not been treated confidentially in the briefs, and were mentioned at oral argument, but any additional information about those items has not been made known publicly. In any event IRS

Chief Judge Parsons fully considered the matter each time the government sought disclosure under a different theory. He concluded in his final order entered on July 2, 1980, which is the subject of this appeal, that Baggot's statement which he read to the grand jury and the Lassar "Memorandum to File" were *not* matters occurring before the grand jury and therefore were not subject to Rule 6(e) secrecy limitations. The remaining items sought to be disclosed were found to be classifiable as occurring before the grand jury. Disclosure, however, was denied for those items on the basis that their use was not "preliminarily to or in connection with a judicial proceedings." Disclosure, nevertheless, was permitted under the court's "general supervisory powers." The justification for use of the court's common law supervisory powers was explained to be to prevent the United States Attorney's office from becoming a storehouse for documents used before grand juries long since discharged and to put the material to some good use commensurate with a governmental purpose. The trial court further noted that the criminal proceedings were closed and that the material was needed to determine the tax liability of Baggot. Under these circumstances the court held Rule 6(e) was not implicated.[7]

The government in this court argues alternative positions to support Judge Parsons' order. First, it

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presumably has that much upon which to initiate an independent civil investigation supplemented by a copy of the criminal information and the proceedings in open court at the time of Baggot's plea and sentencing. Even though we view it as unnecessary, those proceedings in open court were the subject of an order permitting disclosure transmission to the IRS.

[7] A stay of the disclosure was granted on July 7, 1980 pending appeal.

is contended that all of the items, except the testimony of the named witnesses before the grand jury and part of the Special Agent's Report, are not matters occurring before the grand jury so as to be subject to Rule 6(e). Admittedly certain other parts of the Special Agent's Report were derived from grand jury material and therefore would be within Rule 6(e). Secondly, it is urged that the testimony of the witnesses and the grand jury derived portions of the Special Agent's Report, together with any of the other items determined to be, but not conceded to be, within Rule 6(e), should be authorized to be disclosed as preliminary to a judicial proceeding under the exception to Rule 6(e). That judicial proceeding is said to be the usual judicial proceeding that might be initiated by Baggot in the Tax Court if he chose not to pay any deficiency assessment, or in the district court if he chose to pay the deficiency assessment and then seek its return. Third, the U.S. Attorney supports the use of general supervisory power by Judge Parsons in authorizing disclosure. It is argued that since the criminal proceedings are closed there is at best a minimal need for further grand jury secrecy.

Baggot argues that everything sought to be disclosed is a matter occurring before the grand jury, governed by Rule 6(e). He further argues that the "preliminarily to or in connection with a judicial proceeding" exception is not applicable as there is no present judicial proceeding, and whether there may ever be a judicial proceeding in the future depends on whether any deficiency may be assessed, and then whether he decides to pay or contest it. Judge Parsons agreed that the judicial proceeding exception did not apply, labeling the presently intended use by IRS as only administrative.

The Trial Court's Use of its Supervisory Powers

The court in rare situations may have some discretion to slip entirely around Rule 6(e) and permit disclosure, but that discretion in any event is strictly limited. In *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973), disclosure determined to be in the "public interest" was affirmed, one judge dissenting, despite a finding that the disclosure could not be justified by any Rule 6(e) exception. The court considered it a unique case because both the U.S. Attorney and the witness Biaggi, a candidate at the time for mayor of New York, sought limited release of Biaggi's testimony because of certain campaign publicity. It was in the political controversy surrounding Biaggi's campaign that the majority found the "public interest" disclosure justification. Judge Hays, in dissent, preferred a stricter interpretation of Rule 6(e) to a judge-made exception in the "public interest."

The government also directs our attention to *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219 (D.D.C. 1974). In that proceeding, Judge Sirica authorized the disclosure to the House of Representatives for use in its impeachment investigation of a "Watergate" grand jury report concerning the President. Rule 6(e) was found to be no barrier since few reasons for secrecy remained, the President did not object, and the release and disclosure were mandated by the "ends of justice." The determination and collection of any tax deficiency Baggot may owe cannot be considered a compelling need in "a matter of the most critical moment to the nation." 370 F. Supp. at 1229-30.

The government also relies on *In re Bullock*, 103 F. Supp. 639 (D.D.C. 1952). That court permitted disclosure of the grand jury testimony of a witness policeman to the Police Board of Commissioners for the purpose of determining whether that officer had been guilty of dereliction of duty. The testimony of other witnesses, however, was not permitted to be disclosed. The court avoided a literal interpretation of Rule 6(e) by finding disclosure to be within the court's discretion if the furtherance of justice so required.

We may not always be bound by a strict literal interpretation of Rule 6(e) in the situation where there is some extraordinary and compelling need for disclosure in the interest of justice, and little traditional need for secrecy remains[8] but as important as taxes are, their determination, assessment and collection does not satisfy that standard.[9] The IRS has other effective statutory means to accomplish its civil purposes which are generally sufficient. It should be remembered that the statutory authority, 26 U.S.C. § 7602, which authorizes the Internal Revenue Service to examine any books or records and to cause persons liable for tax and other payments to appear and give testimony, is to be liberally construed in recognition of the vital public purposes served. *United States* v. *Continental Bank & Trust Co.*, 503 F.2d 45, 50 (10th Cir. 1974); *De Masters* v. *Arend*, 313 F.2d 79, 86-87 (9th Cir.), *cert. dismissed*, 375 U.S. 936 (1963). The government argued to the district court, however, that in this case the Internal Revenue Service was stymied in its efforts to determine Baggot's additional tax obligations, if any. That may be, but the failure of civil process has not been demonstrated in the record. The issue also has significant impact, the government argues, because of the practical concerns which an adverse ruling would have on IRS's future cooperation with subsequent grand jury tax investigations if subsequent disclosure for the civil or other IRS purposes is restricted.[10]

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[8] The general justification for grand jury secrecy is set forth in *United States* v. *Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954), *cited with approval in United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958).

[9] *See generally United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958).

Our conclusion about the applicability of the Rule 6 exception in this case is a long way from holding that testimony or documents presented to a grand jury are forever foreclosed from future revelation to proper authorities. *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960). It is admitted that the government has alternative independent civil means to use for the purpose, but it is argued it will take longer. "It is almost," the United States Attorney argued, "as though you have two different governments, one working against the other, rather than a single unified government of the United States trying to accomplish collection of taxes and prosecution for those who wilfully violate the tax laws." That may seem to be the case, but there are other considerations, however, beside taxes. One consideration which remains is the possible impact upon future grand juries, as wholesale subsequent disclosure might discourage free and untrammeled disclosures by persons having information with respect to the commission of crimes. *United States* v.

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[10] If the grand jury had had sufficient evidence to indict Baggot for tax violations, then but for the plea agreement to the commodity violations, that tax evidence would have been publicly disclosed in open court as a basis for the acceptance of a plea of guilty or otherwise revealed at trial. In that situation the present disclosure problem would not have arisen.

Rose, 215 F.2d at 628-29. A liberal disclosure policy in tax cases would no doubt facilitate tax collection but it would also create a temptation to abuse the grand jury process. Perhaps few, if any, other countries would restrict the flow of information within the government as we do in various areas, but few other countries are so zealous in protection of the individual rights of its citizens. The government's practical short cut is viewed approvingly in *In re Grand Jury Subpoenas, April, 1978*, 581 F.2d 1103, 1110 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979), and in *In re December 1974 Term Grand Jury Investigation*, 449 F. Supp. 743 (D. Md. 1978). *But see United States* v. *Bates*, 627 F.2d 349, 351 n.1 (D.C. Cir. 1980).

The Application of Rule 6(e)

The trial judge found the first two items, the statement Baggot read to the grand jury and the Lassar "Memorandum to File," not to be matters occurring before the grand jury under Rule 6(e), and that therefore those two items were disclosable by the government. The trial court made a distinction between Baggot's prepared statement which he read to the grand jury and the transcript of the grand jury proceedings which contained the statement as he read it. The latter, under that view, would not be disclosable. The government argues that disclosure is for a legitimate purpose and not an effort by the Internal Revenue Service to determine what transpired before the grand jury. Baggot's statement, the government explains, was actually prepared outside the grand jury and is nothing more than an acknowledgment of certain facts about the case. The test, according to the government, is whether the document being sought by the Internal Revenue Service for a legitimate purpose will reveal "what took place before the grand jury." *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d at 54. In that case the Interstate Commerce Commission sought to examine the financial records being held under a federal grand jury subpoena *duces tecum.* The records belonged to persons subject to regulation by the Interstate Commerce Commission. Permitting that examination was held not to be a "disclosure of matters appearing before the grand jury" because the Interstate Commerce Commission had statutory purposes and was not seeking to learn what use the grand jury had made of the records.

Baggot's statement, however, is no ordinary business document. It is a statement prepared by the government as a part of a plea agreement for the purpose of having it constitute the bulk of Baggot's testimony when read by him to the grand jury. The statement resulted from an interview with an Assistant United States Attorney when Baggot responded to a grand jury subpoena. Baggot's statement is too grand jury related to be artificially distinguished from the transcript of its reading to the grand jury. We hold the statement is governed by Rule 6(e).

It appears to us that the trial judge may have had a different understanding about the factual background of the Lassar "Memorandum to File." Chief Judge Parsons, in his opinion, indicates he considered the memorandum to reflect only information which the government had learned through its prior non-grand jury investigation of Mr. Baggot, independent of his grand jury appearance one month later. We understand the memorandum to be the documentation for the government file of the first government interview with Baggot when he appeared and was interviewed in response to the grand jury subpoena. At that interview he was admonished that if he "told the truth" he could avoid his actual grand jury appearance. He chose to avoid the grand jury and made admissions of wrongdoing. Those admissions are memorialized in the "Memorandum to File." Making notes for the file in these circumstances may be considered a good administrative procedure, but Rule 6(e) is not thereby necessarily avoided. We are not prepared to hold that the memorandum, although not read to the grand jury, is any less grand jury related than the Baggot statement itself. The file memorandum was used to assist the government in preparation of the Baggot statement which was read to the grand jury. We consider the file memorandum also to be governed by Rule 6(e).

The Special Agent's Report is characterized by the government as consisting of the agent's summary of the case and recommendations, analysis of documents and summaries of witness interviews. Some parts of the report admittedly summarize grand jury testimony and that part is conceded to be governed by Rule 6(e), but not the other contents of the report. Since it appears that the agent's report was prepared after the grand jury had concluded its investigation and summarizes grand jury testimony, it is difficult to see how the report's summary, recommendations, and analysis of documents is sufficiently divorced from the grand jury not to be subject to Rule 6(e). We assume the documents which were analyzed were the documents subpoenaed before the grand jury. Included in the report are also witness interviews. If those interviews resulted, as did Baggot's, from grand jury subpoenas, then we would view them likewise.

Our ruling in this case, however, shall not apply to so much of the report, if any, as may be clearly divorced from the grand jury proceedings. Our holding shall be without prejudice to the government to sort out parts of the report not falling within the restricting views expressed in this opinion and upon approval of the district court to disclose limited portions of that report to the Internal Revenue Service for civil purposes.

Therefore, with that possible limited exception regarding the agent's report, we view all the additional materials sought to be disclosed, the business records, letter and witness testimony as also being "matters occurring before the grand jury" and therefore subject to Rule 6(e).

Rule 6(e) Exception

Rule 6(e) secrecy may be breached when "directed by the court preliminarily to or in connection with a judicial proceeding." Rule 6(e)(3)(C)(i). The government argues alternatively that the customary civil tax collection procedures which ultimately may result in litigation in the Tax Court or United States District Court satisfy the "preliminarily to or in connectio with a judicial proceeding" exception. The district court found those civil procedures in their present status to be only administrative. The option of litigation rests with the taxpayer who may choose to pay any deficiency assessed if one is even assessed. At least at the present time before any deficiency has even been assessed, the disclosure sought clearly cannot be considered as being in connection with an actual judicial proceeding. The only possibility is that disclosure might be considered to be preliminary to a judicial proceeding.

We agree with Chief Judge Parsons that the present Internal Revenue Service civil investigation of Baggot's possible additional tax liabilities is too embryonic, speculative, and uncertain to firmly say that it is "preliminarily to" a judicial proceeding. *See In re April 1977 Grand Jury Proceedings*, 506 F. Supp. 1174 (E.D. Mich. 1981) (and the cases cited therein). It is at best, with no judicial proceeding now pending and with the possibility that none may result only preliminary to and in connection with, not a judicial proceeding, but a type of administrative proceeding or investigation. *See In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962), a case decided before the addition of the "specific judicial proceeding" exception to Rule 6(e). The government relies on *Special February 1971 Grand Jury* v. *Conlisk*, 490 F.2d 894 (7th Cir. 1973). That case may be distinguished. In that case the Chicago Police Board sought grand jury transcripts of certain policemen's appearances before the grand jury for use in disciplinary proceedings against those same police officers. The Board was seeking to determine that the officers failed to give testimony before the grand jury on the grounds it might tend to incriminate them. If that privilege had been claimed, it would have been in violation of departmental rules. We concluded that the Board hearing was "preliminary" to judicial review because the statutory scheme contemplated judicial review of the Board's findings. Charges had been made by the Superintendent of Police and the matter was to be heard before the Board. At that type of proceeding a policeman may appear with counsel, present witnesses and evidence in his own behalf and cross-examine witnesses. A record of the hearing is kept and the matter may be reviewed in the state courts. In the present case we have no comparable situation. Similarly, in *Matter of Disclosure of Testimony*, 580 F.2d 281 (8th Cir. 1978), limited grand jury disclosure to the Council for Discipline of the Nebraska State Bar Association and the Nebraska Commission on Judicial Qualifications was permitted in a disciplinary investigation of a former prosecutor and possibly a judge allegedly involved in the obstruction of enforcement of the state gambling laws. It was held that proceedings for disciplining lawyers and removal of judges were designed to culminate in a judicial proceeding and therefore were "preliminarily to or in connection with a judicial proceeding." Obviously, there is some flexibility evident in what may be viewed as qualifying for the exception, but the rule is not so flexible as to cover the present Internal Revenue Service administrative interest in the taxes of Baggot. *See In re 1978-1980 Grand Jury Proceedings*, 503 F. Supp. 47 (N.D. Ohio, 1980).[11] The *Conlisk* case, cited by the government, rather than being a signal for liberal disclosure, instead reaffirmed our respect for grand jury secrecy under Rule 6(e). 490 F.2d at 895-96.

If Congress had intended that grand jury materials could generally be used for the convenience of the government to facilitate its other legitimate purposes, particularly after the grand jury's legitimate criminal function had terminated, it could easily have provided for it. As it is, Congress specified only three exceptions, *Conlisk*, 490 F.2d at 896, none of which helps the government in this case. As the government correctly points out, however, there was no intent discernible in the legislative history to generally preclude the use of legitimate grand jury developed evidence for civil law enforcement purposes that is evident from the remarks of Congressman Wiggins of the House Judiciary Committee:

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[11] *See also In re J. Ray McDermott & Co., Inc.*, 622 F.2d 166 (5th Cir. 1980); and *In re Grand Jury Investigation of Uranium Industry*, 1979-2 Trade Cases (CCH), ¶ 62,798 (D.D.C. 1979).

> There will come a time when a grand jury uncovers violations of civil laws, or state or local laws. It then becomes the duty of the attorney for the government, if he or some other attorney for the government cannot act on that information, to turn it over to the appropriate governmental agency so that such agency can do its duty. However, the attorney for the government may do this only after successfully seeking an order of the court.

123 Cong. Rec. 15196 (1977).

What should not be overlooked in those remarks is the "However" segment which conditions disclosure upon the attorney for the government successfully seeking an order of the court. What the Congress then legislated for judicial guidance was not a general grant of broad discretion to permit the courts to authorize disclosure for any good government purpose. Instead, traditional grand jury secrecy was specifically provided subject only to certain limited exceptions in which the court's discretion might properly be exercised.

There may be compelling situations necessitating disclosure to satisfy the "ends of justice." *Douglas Oil Co.* v. *Petrol Shops Northwest,* 441 U.S. 211, 219-20 (1979); *United States* v. *Socony-Vacuum Oil Co., Inc.,* 310 U.S. 150, 234 (1940), but Baggot's possible tax deficiency although of importance and worthy of civil pursuit, is not of such consequence as to justify the fashioning of a special judicial exception to grand jury secrecy.

CONCLUSION

In our view all of the items sought to be disclosed are items "occurring before the grand jury," with the possible exception of limited portions of the agent's report, and do not qualify at the present stage of Internal Revenue Service administrative proceedings for any exception to Rule 6(e).

Reversed and remanded for possible further consideration of such parts of the agent's report as still may be claimed to be matters not occurring before the grand jury in accordance with the views expressed in this opinion.

PELL, concurring in part, dissenting in part.

The majority opinion correctly characterizes its view as being "restricting." Because I regard the views expressed in the majority opinion as being unduly restricting of a legitimate use of the requested material, I respectfully dissent. I do agree with the majority opinion in its holding that the district court exceeded its discretion in permitting disclosure under its supervisory power. On the other hand, in my opinion the Internal Revenue System was entitled under Rule 6(e)(3)(C)(i), Fed. R. Crim. P., to most, if not all, of the disclosure it requested.

The majority opinion cites at two places *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960). I do not gather that the majority thought that case was incorrectly decided. Chief Judge Lumbard made it succinctly clear that the rule against disclosure was "intended only to protect against disclosure of what is said or what takes place in the grand jury room." *Id.* at 54. The opinion in *Interstate* also pointed out that the purpose of the secrecy rule was not to foreclose from all further revelation to proper authorities the information or documents which were presented to the grand jury. *Id.* Elaborating further the court stated:

> Thus, when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

Id.

Unfortunately, it appears to me that the majority opinion has unduly limited the rule permitting disclosure, notwithstanding a disclaimer of such intent, so as to foreclose substantially further revelation of any documents or testimony to proper authorities in a situation such as that here involved in which there is no presently existing "judicial proceeding." The majority opinion fails to give any real recognition to the word "preliminarily" in the rule of disclosure. Obviously, it appears to me, the drafters of the rule contemplated two situations in which there could be disclosure based upon a judicial proceeding situation. One of these was "in connection" with a judicial proceeding which would seem to mean that there was a judicial proceeding in existence. On the other hand, if we give the plain dictionary meaning to the word "preliminarily" that of "preceding the main business" or "lying before," or "leading to," the disclosure would be pertaining to a judicial proceeding not yet in existence. The majority opinion appears to hold that there must be some real certainty that there will be a judicial proceeding, or, at the very least, such a proceeding must be in an enceinte status. I do not regard the rule as so requiring.

It is true, of course, as the majority states, that the option of litigation rests with the taxpayer who may wish to pay any deficiency assessed if one is even assessed. From the vigorous manner in which the present litigation is being pursued, I would find more certainty in the likelihood of ultimate judicial proceedings than does the majority. In any event, the actual beginning of litigation is always an uncertain matter which may be deferred or even never begun for any of several reasons. If we read into the rule that the disclosure preliminarily to a judicial proceeding must be preliminarily to a judicial proceeding bound to happen, we substantially are curtailing the plain language of the rule in a situation such as the present where there has been a guilty plea to an information charging an understatement of taxable income of approximately $60,000. It would not seem to characterize correctly the likelihood of ultimate vigorous pursuit of civil liability by the Internal Revenue Service as being "embryonic, speculative and uncertain." In sum, on this point, it appears to me from the facts of this case that there is reasonable certainty that a judicial proceeding will follow but that even if this was not a practical certainty under the plain wording of the rule of disclosure the Internal Revenue Service was entitled to disclosure of the items it sought.

A secondary aspect, however, aside from that of being preliminarily to a judicial proceeding is that much of the material sought is in the nature of documents which are sought for their own sake or as Chief Judge Lumbard stated for their "intrinsic value in the furtherance of a lawful investigation." *Interstate*, 280 F.2d at 54.

This court approved the above principle in *United States* v. *Stanford*, 589 F.2d 285, 291 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979). Under the principle established in that case, it would appear that some of the documents in the present case, in any event, should have been disclosed. These were the "Memorandum to File" prepared by the Assistant U.S. Attorney, a letter to Baggot from Pacific Trading Company, and purchase and sale statements from Baggot's account.

The Lassar memorandum was clearly a work product of the attorney and it appears to me that on its face it reveals nothing about what occurred before the grand jury. Even if Lassar had intended some of his memorandum to refer to matters which might be presented to the grand jury it is speculative to say that any particular factual matters were actually so presented. Baggot argued in his reply brief that *Stanford* was factually distinguishable in that the disclosures made were documents which the complainants had either personally executed or with which they were thoroughly familiar. In the present case, I fail to see why a letter to Baggot and his purchase and sale statements would not be matters with which he was thoroughly familiar. There was probably good reason to think that other purchase and sale documents were items with which he was familiar. Baggot also attempts to distinguish *Stanford* on the basis that the documents there were not disclosed because they revealed nothing about the grand jury investigation. Because the correspondence and commodities statements have in the meaning of *Interstate* their own intrinsic value I fail to see where the documents themselves reveal anything about the grand jury investigation. They are sought for their own significance not because of their having been put before the grand jury. An appropriate inquiry would be whether documents, once they have been before a grand jury, are immobilized perpetually from use in a legitimate investigation by another branch of government. The majority opinion has not chosen to address *Stanford* at all.

Baggot also attempts to distinguish *Interstate Dress Carriers* because of the "independent statutory authority" which the ICC commanded to inspect the documents. Baggot also argues that the IRS had "no comparable right . . . to the grand jury documents."

However, this ignores the fact that in *Interstate* the documents had personally been subpoenaed by a grand jury and were in custody of the Justice Department pursuant to the subpoena. Further, as the majority opinion itself mentioned, the IRS did have comparable statutory authority to that of the ICC under 26 U.S.C. § 7602 to examine books and records. Certainly this would apply to Baggot's own documents such as a letter to him and documents pertaining to his commodity transactions.

A later case which I regard as stating the law of this circuit as set forth in *Stanford* is that of *S.E.C.* v. *Everest Management Corp.*, 87 F.R.D. 100, 105 (S.D.N.Y. 1980). In that case, the SEC requested permission to use documents presented directly to grand juries pursuant to grand jury subpoenas. The court summarized the law which I believe should be applicable to the documents here involved as follows:

> A request for grand jury documents evokes different, and less exacting, considerations than a request for transcripts of grand jury testimony. *Illinois* v. *Sarbaugh*, 552 F.2d 768, 772 n.2 (7th Cir.), *cert. denied*, 434 U.S. 889, 98 S.Ct. 262, 54 L.Ed.2d 174 (1977); *see United States* v. *Stanford*, 589 F.2d 285, 291 (7th Cir. 1978), *cert. denied*, 440 U.S. 983, 99 S.Ct. 1794, 60 L.Ed.2d 244 (1979). Documents produced to the grand jury do not intrinsically reveal what transpired in the grand jury room. This reasoning has led some courts to comment that documents may not fall within the ambit of rule 6(e)'s secrecy requirement. *United States* v. *Weinstein*, 511 F.2d 622, 627 n.5 (2d Cir.), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975); *In re Grand Jury Investigation of Ven-Fuel*, 441

> F.Supp. 1299, 1303 (M.D.Fla. 1977). The more prevalent view, and the one opted for by this court, is expressed in *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960): "Documents as well as oral testimony of course may come within rule 6(e)'s proscription against disclosure." Emphasis is placed on the purpose for which grand jury documents are sought. Disclosure is appropriate where documents are sought to further legitimate purposes in connection with lawful investigations or judicial proceedings. *See, e.g., Interstate Dress Carriers, Inc., supra,* 280 F.2d at 54 (disclosure to further lawful agency investigation); *United States* v. *Saks & Co.*, 426 F.Supp. 812, 815 (S.D.N.Y. 1976) (same); *Capitol Indemnity Corp.* v. *First Minnesota Construction Co.*, 405 F. Supp. 929, 931 (D.Mass. 1975) (disclosure to further discovery in civil litigation).

In *Everest*, the SEC was granted disclosure even though its need for the documents was largely occasioned by its own carelessness. The district court judge observed that disclosure would save the parties from costly and perhaps futile discovery of documents produced earlier to the grand jury. Here the majority opinion requires the IRS to utilize discovery procedures other than utilizing the documents which should be readily available under the law just cited. Little purpose is served by such a requirement in this case where the grand jury proceedings have long since expired.

Finally, while the majority opinion accords some deference to the importance of collecting taxes and refers to such as "being worthy of civil pursuit," the opinion nevertheless holds that it is not of such consequence as to justify the fashioning of a special judicial exception to grand jury secrecy. For the reasons I have indicated herein, I do not think any judicial exception need be fashioned. All that needs to be done is to apply existing law to an extremely important phase of governmental activity, namely that of collecting the revenue often from unwilling or evasive sources. Our taxation system is frequently under attack and we are aware that evasion does occur. We should also be mindful that the continued functioning of our government is dependent upon the successful collection of legitimately owed taxes.

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1999

IN RE: THE SPECIAL FEBRUARY, 1975 GRAND JURY
THE SPECIAL APRIL, 1977 GRAND JURY

Appeal of: JAMES E. BAGGOT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-GJ-534—James B. Parsons, *Judge*

ARGUED FEBRUARY 10, 1981—
DECIDED NOVEMBER 20, 1981

Before PELL, *Circuit Judge*, MARKEY, *Chief Judge*,[*] and WOOD, *Circuit Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appelle, James E. Baggot, a vote of the active members of the court was requested. The panel considered the petition for rehearing and a majority of the judges on the original panel have voted to deny the petition for rehearing. A majority of the active members of the court have also voted to deny a rehearing *en banc.***

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[*] The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that the supplement to the majority opinion and also the partial concurrence and dissent attached to this order shall be, and the same are made a part of the opinion in this case.

SUPPLEMENT TO THE MAJORITY OPINION

WOOD, *Circuit Judge.* Judge Pell's dissent and the government's petition for rehearing correctly point out that the majority opinion did not discuss in depth its holding that certain commodity trading records subpoenaed by the grand jury from third parties were considered to be items subject to Rule 6(e). Some additional comments are therefore appropriate.

We see no conflict with our holding in *United States* v. *Stanford,* 589 F.2d 285 (7th Cir. 1978), *cert. denied,* 440 U.S. 983 (1979). The factual circumstances of that case were peculiar and distinguishable, but apart from that the rule discussed there has not been satisfactorily met to permit release of the documents in the present case. In *Stanford,* it was the defendants who claimed a violation of Rule 6(e) because they, not some third parties, were shown certain documents from their own individual governmental employment or welfare files obtained by grand jury subpoena. This court determined that the document disclosure was proper. That holding, with which we agree, was: "The disclosures challenged here revealed nothing about the grand jury investigation, and the disclosures were made only to persons legitimately connected with the documents." 589 F.2d at 291. It is stressed that "[u]nless information reveals something about grand jury proceedings, secrecy is unnecessary." *Id.*

** Judges Bauer and Pell have voted to grant the petition for rehearing *en banc.*

Judge Parsons in the present case considered *Stanford* and correctly concluded that the particular documents which he examined in camera should nevertheless be viewed as matters occurring before the grand jury and therefore subject to Rule 6(e). As he was thoroughly familiar with the grand jury proceedings, we see no justification for disputing his view of those documents. The information filed against Baggot sets out various commodity trades which were in question. The particular documents appear to be releated to those trades and to be the basis of the grand jury's investigation. The defendant aptly labels the documents the "essence" of the grand jury inquiry. We note that the government did not cross appeal Judge Parson's *Stanford* ruling as Judge Parsons nevertheless proceeded to release the documents under his general supervisory powers.

It seems to be argued that if documents subpoenaed by a grand jury have some "intrinsic value," that is, they were created for purposes other than the grand jury investigations, then they are automatically outside of Rule 6(e). *See United States* v. *Interstate Dress Carriers*, 280 F.2d 52, 54 (2d Cir. 1960), and its progeny. If that is all there is to the test, grand jury secrecy would be seriously eroded by being sacrificed to the alleged need for the documents by someone else and the power of a grand jury could be misused. The policies favoring grand jury secrecy in most instances must still be given due weight. *Douglas Oil Co.* v. *Petrol Shops Northwest*, 441 U.S. 1211, 219 n.10 (1979); *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 681-82 and n.6 (1958).

It is not the holding of this case that all third party documents subpoenaed by a grand jury thereby forever after acquire immunity from any other use.[1] Only those subpoenaed documents should be subject to Rule 6(e) which when reasonably considered in the context of the particular grand jury investigation are determined by the trial court to reveal some secret aspect of the grand jury investigation. If a third party document has intrinsic value and a usefulness for other legitimate purposes and would not breach grand jury secrecy, it may be released for those purposes outside of Rule 6(e). The trial judge who is thoroughly familiar with the grand jury proceeding should be accorded wide discretion in that determination.

Some courts have gone a degree further than we find necessary in these particular circumstances and have held that "matters occurring before the grand jury" include documents that "[*m*]*ay tend* to reveal what transpired before the grand jury." (Emphasis supplied.) *United States* v. *Armco Steel Corp.*, 458 F. Supp. 784, 790 (S.D. Mo. 1978). *Accord, In re Grand Jury Investigation* (*Lance*), 610 F.2d 202, 216 (5th Cir. 1980); *United States* v. *Gold*, 470 F. Supp. 1336, 1350 (N.D. Ill. 1979). *See also United States* v. *Hughes*, 429 F.2d 1293, 1294 (10th Cir. 1970); *U.S. Industries, Inc.* v. *United States District Court*, 345 F.2d 18, 20-21 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965). Under that test, the documents here would unquestionably be protected from disclosure.

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[1] Upon return to their original owners after serving their grand jury purposes, the documents in any event would be subject to later subpoena and use by others.

SUPPLEMENTAL CONCURRENCE AND DISSENT

PECK, *Circuit Judge*, concurring in part, dissenting in part.

While I continue to adhere to the position taken and the supporting reasons therefor expressed in my partial concurrence and partial dissent to the original opinion of this court, I do note the following in response to the Supplemental Opinion.

The Supplemental Opinion does address the case of *United States* v. *Stanford*, 589 F.2d 285 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979), and purports to brush it aside as being distinguishable. I fail to discern that the Supplemental Opinion has demonstrated that the principles enunciated in *Stanford* are not applicable to at least a part of the items that the majority now veils in secrecy. The Supplemental Opinion states that the majority agrees with the holding in *Stanford* but that the disclosures challenged there, first of all, reveal nothing about the grand jury investigation, and second, that the disclosures were made only to persons legitimately connected with the documents. To the first of these grounds which the majority apparently finds as a basis of nonapplicability of *Stanford* to the present case, as I endeavored to show in my original dissent at least some of the documents reveal nothing about what occurred before the grand jury. As to the second of the above so-called distinguishing features between *Stanford* and the present case this was phrased somewhat differently by Baggot's response to the opposition to the rehearing *en banc* as being disclosures of documents "which the complainants either personally executed or with which they were thoroughly familiar." Certainly a letter to Baggot and his purchase and sales statements would be matters with which he was thoroughly familiar. Indeed, he presumably personally executed some of these. His connection with the documents would also seem to have been legitimate. Baggot also argues in his response that the disclosure in *Stanford* was made for use in a criminal investigation rather than for civil purposes. Certainly it would seem that their disclosure in a criminal investigation would be more prejudicial than in a civil investigation. The Government is seeking disclosure in both the present case and in *Stanford*.

I also note the Supplemental Opinion's statement that "[o]nly those subpoenaed documents should be subject to Rule 6(e) which when reasonably considered in the context of the particular grand jury investigation are determined by the trial court to reveal some secret aspect of the grand jury investigation." This presents what is indeed an anomalous attribute of the district court's opinion. That court, while finding a grand jury nexus on many of the documents, nevertheless apparently was not sufficiently impressed that disclosure would "reveal some secret aspect of the grand jury investigation," because the court nevertheless permitted disclosure under its supervisory power.

In sum, no doubt it is good policy to render obeisance at the shrine of grand jury secrecy, but that policy does not require that the worship should be cultish.

A true Copy:

Teste:

....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 76 GJ 534

IN RE: THE SPECIAL FEBRUARY 1975 GRAND JURY

SPECIAL APRIL 1977 GRAND JURY

MEMORANDUM OPINION AND ORDER

This is a motion by the United States Attorney for the Northern District of Illinois brought under Rule 6(e)(2)(C)(i) of the Federal Rules of Criminal Procedure for an order authorizing disclosure of certain materials to the Examination Division of the Internal Revenue Service.[1] The United States Attorney asserts that the Chief of the Examination Division requested that he seek a disclosure order so that the IRS can have access to grand jury materials bearing upon its investigation into the civil tax liability of James E. Baggot. A summary of facts and circumstances bearing upon the pending motion is useful.

In May 1976, the Special February 1975 Grand Jury began investigating certain commodity futures trading transactions on the Chicago Board of Trade for possible violations of the Commodity Exchange

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[1] The government also has filed a "Motion to Clarify" the court's Memorandum Opinion and Order dated November 21, 1979. In filing that motion, the government evidently assumed that the November 21st opinion was issued in response to the pending motion. However, that opinion merely revised an earlier Memorandum Opinion and Order. Accordingly, the Motion to Clarify is allowed.

Act, the Internal Revenue Code, and other federal laws. The investigation was continued by the Special April 1977 Grand Jury. During the second grand jury's inquiry, two IRS agents visited Mr. Baggot at his home on May 2, 1977. The agents questioned Mr. Baggot, a former floor trader at the Chicago Board of Trade, and at the end of the session they served him with a subpoena directing him to appear before the Special April 1977 Grand Jury two days later on May 4, 1977. Mr. Baggot responded to this subpoena on the appointed day, but instead of appearing before the grand jury, he went to and was interviewed by Assistant United States Attorneys in the room identified on the subpoena and numbered 1500 of the Dirksen Building. This then was the Grand Jury Room. It was located in the offices occupied by the government's attorneys. Counsel for Mr. Baggot was not present on this occasion. Subsequently, on June 6 and June 8, 1977, Mr. Baggot then accompanied by counsel, had two or more interviews with Assistant United States Attorneys. Following these interviews the government entered into a plea agreement with him and he then went before the grand jury and read a statement to it consistent with his plea agreement. The plea agreement provided that Mr. Baggot would plead guilty to a two count information charging misdemeanor violations of the Commodities Exchange Act, 7 U.S.C. Sec. 6(a)(A) and that his criminal exposure for those violations would be limited. The grand jury did not proceed on to a determination. Instead, a two count information was filed by the government, given the case No. 77 CR 564 and on June 24, 1977, Mr. Baggot pleaded guilty to the information in accordance with his agreement. This information did not involve IRS violations.

The government's efforts to cause the information generated by the grand jury and by the investigation of Mr. Baggot to be transferred from the grand jury to the civil division of the IRS began early in 1978 with a motion by the United States Attorney pursuant to Rule 6(e) requesting that civil IRS agents be granted access to "subpoenaed books, records, materials and [grand jury] transcripts." On June 4, 1978, I denied the motion without prejudice on the grounds that the government failed to establish with particularity a need for the documents, *See, United States* v. *Proctor & Gamble Co.*, 356 U.S. 677 (1958), and that its request was not preliminary to or in connection with a judicial proceeding. Next the government sought an order by this court authorizing the United States Attorney to turn over to the Audit Division of the Internal Revenue Service particularly specified materials.[2] When making this request the government maintained as to items (1) and (2) that the court would not have to issue the order pursuant to Rule 6(e) since the materials were not "matters occurring before the grand jury." In a Memorandum Opinion and Order dated October 28, 1978, I denied that motion and granted Mr. Baggot's motion to restrain disclosure on the ground that the materials were matters occurring before the grand jury which could be disclosed only with a 6(e) order. I ruled on

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[2] These materials included:

(1) One page statement read to the grand jury by Mr. Baggot;

(2) A one page "Memorandum to File" prepared by Assistant United States Attorney Scott R. Lassar relating to an interview with Mr. Baggot;

(3) Records produced by the Pacific Trading Company in response to grant jury subpoena.

December 6, 1978, that the United States Attorney did not need the authority of a court order issued under Rule 6(e) to transmit to the IRS Examination Division certain other documents pertaining to the case involving Mr. Baggot.[3]

The present motion requests a 6(e) order to permit the IRS Examination Division to receive the following materials: (1) a one page statement prepared for Mr. Baggot by the United States Attorney's Office and read by him to the grand jury; (2) a one page "Memorandum to File" prepared by Assistant United States Attorney Scott R. Lassar subsequent to a meeting with Mr. Baggot on May 4, 1977; (3) a letter to Mr. Baggot from the Pacific Trading Company showing his net profit for the year 1975; (4) all purchase and sale statements for accounts in the name of James Baggot at the Pacific Trading Company for the year 1975; (5) all purchase and sale statements at Central Soya, Inc. for the account numbered 509 in the name of James Kerrins, the account numbered 608 in the name of Katherine Michaleski, and the account numbered 605 in the name of Guenther Kromminga, all for the year 1975; (6) transcripts of the grand jury testimony of Robert Meyer, James Kerrins, Katherine Michaleski and Guenther Kromminga; (7) the Special Agent's report on Mr. Baggot.

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[3] The documents at issue there were as follows:

(1) The information of Mr. Baggot;

(2) The transcript of proceedings before Judge McGarr on June 24, 1977, and a minute order entered by Judge McGarr on the same date;

(3) The transcript of proceedings before Judge Marshall on September 16, 1977, and a minute order entered by Judge Marshall on the same date.

The government's attorneys predicate the instant motion on an exception to Rule 6(e)'s general proscription against disclosing "matters occurring before the grand jury" which provides that such matters may be disclosed "preliminarily to or in connection with a judicial proceeding." Citing two cases from this circuit as authority, *Special February 1971 Grand Jury* v. *Conlisk*, 490 F.2d 894 (7th Cir. 1973); and *Patrick* v. *United States*, 524 F.2d 1109 (7th Cir. 1975), the government contends that the investigation by the IRS Examination Division into Mr. Baggot's civil tax liability is preliminary to a judicial proceeding because he can appeal a determination of liability by the IRS in the federal judicial system. It also maintains that the justifications for upholding the policy of grand jury secrecy embodied in Rule 6(e) have been dissipated here because the criminal proceedings involving Mr. Baggot have concluded and Mr. Baggott has made a public acknowledgement of his guilt.

The government's motion reflects my earlier opinion that all of the materials it is seeking to have disclosed to the IRS are "matters occurring before the grand jury" which require a court order under Rule 6(e) authorizing disclosure. I am of the opinion, however, that I need once again consider the contours of the phrase. Over the many months that have transpired I have had new occasions to consider it and come to a different conclusion as to what should be "matters occurring before the grand jury." I welcome this opportunity to revise my definition of that phrase.

Rule 6(e) codifies a common law practice of conducting grand jury proceedings under the protective cloak of secrecy.[4] The language in the Rule stating the general policy of secrecy reads as follows:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government or [government personnel assisting an attorney for the government] shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. 18 U.S.C.A. Rule 6(e)(1) (West Supp. 1979).

Although Congress has amended Rule 6(e) several times since it was first adopted in 1946 as part of the original set of the Federal Rules of Criminal Procedure, the basic prohibition against disclosing "matters occurring before the grand jury" has remained intact. And during that time Congress has left the definition of the phrase as a matter entirely for judicial interpretation.

There certainly can be no doubt that grand jury transcripts of testimony are "matters occurring before the grand jury" because they reveal a very alive part of the proceedings. This proposition is easily reflected in the few decisions attempting to construe the phrase. See, *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960); *United States* v. *Armco Steel Corp.*, 458 F.Supp. 784, 789 (W.D. Mo. 1978). But it must be stated as a general rule that documents and other exhibits obtained under the authority of a grand jury subpoena are to be included as well.[5] Cf. *In Re April 1956*

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[4] The Supreme Court has outlined on at least two occasions the numerous and well-founded reasons for this policy. *See, United States* v. *Procter & Gamble Co.*, 356 U.S. 681-82, n.6 (1958); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979).

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[5] My research indicates that there are at least two appellate decisions holding that some documents obtained under the authority of a grand jury subpoena may fall outside the ambit of matters occurring before the grand jury. *United States* v. *Stanford*, 589 F.2d 289 (7th Cir. 1978); *United States* v. *Interstate Dress Carriers*, *supra*. The first case presented a special and very unusual set of facts and must be read in the special light of those facts. The second raises a serious question about statutory interpretation. See my decision of November 21, 1979.

Stanford involved an appeal by defendants who had been convicted of mail fraud and making false statements in connection with benefits they received from the Illinois Department of Public Aid (IDPA). During the final stages of a grand jury investigation, agents of the grand jury interviewed persons suspected of welfare fraud using subpoenaed documents such as benefit applications, employment files, and determination of eligibility forms to refresh their memories and verify their signatures. No court order under Rule 6(e) was obtained authorizing the agents to show these documents to the suspects. Some of the suspects apparently rendered confessions on the basis of the interviews. As one ground on appeal for seeking dismissal of the indictment or suppression of the confessions, the defendants argued that the grand jury agents violated Rule 6(e) by showing them the documents without a court order. Reasoning that the disclosures to the defendants did not reveal the substance of the grand jury investigation and "that the disclosures were made only to persons legitimately connected with the documents," the Court of Appeals rejected this argument. Indeed, the facts in *Stanford* were quite novel; the persons who alleged a breach of grand jury secrecy based upon disclosures made to them either had personally executed the documents in question, or were thoroughly familiar with their contents. What the documents revealed to them was not new to them. While the concept of a grand jury using an agent to go out and investigate for it is foreign to the concept of the grand jury's investigative tools being limited to the subpoena, it is well established

Term Grand Jury, 239 F.2d 263, 272 (7th Cir. 1956). Matters handled on behalf of the grand jury by agents of the grand jury by virtue of their agency whether or not the agents report back to the grand jury, would or would not be "matters occurring before the grand jury" according to the circumstances involved in the handling of those affairs. It seems to me that each instance would have to be decided on its own without sharply defined boundaries. This is particularly true where government attorneys or agents, while acting under agency appointments by the grand jury, such as to serve process or receive documents subpoenaed, are also conducting their own independent investigations locating materials which they may or may not consider as having been located

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that grand juries may depend upon agents, such as handwriting experts, to make meaningful for them materials not otherwise easily understood. This case fits into the later category and the Court understandably sought a practical result to a practical problem.

In *Interstate Dress*, the Second Circuit affirmed an order by a district court authorizing a government agency, the Interstate Commerce Commission, to inspect and copy certain records being held by the Justice Department pursuant to a grand jury; subpoena. The Court of Appeals reasoned that disclosure was not prohibited by Rule 6(e) because of the ICC's independent statutory authority to inspect the records and because inspection by the ICC would "in no way impinge upon the secrecy of the grand jury's deliberations." It also concluded that the ICC's petition did not involve a question of the disclosure of "matters occurring before the grand jury." For the court to conclude, in effect, that records obtained by a grand jury subpoena for consideration by a sitting grand jury were not matters occurring before the grand jury, it seems to me, does violence to the language of 6(e), and was unnecessary to the decision, particularly in light of the ICC's independent legal authority to inspect the records.

through their grand jury agency. And then there is the ordinary situation in which the grand jury appoints an investigative agent of some bureau to make for it a clear transcription of an otherwise generally unintelligible kel-set tape, or to take a handwriting sample, compare it with a questioned signature, and determine for the grand jury whether or not the interviewee wrote it. Of course, when the determination is positive the procedure will have brought about a confession; but since it is not a spoken confession, the 5th Amendment doesn't apply. It seems that acknowledging identifying documents such as social security cards stands on the same "ordinary personal characteristics" level. On the other hand, however, is the unlimited interview by the bureau agent presumably sent by the grand jury merely to serve a subpoena. With these principles as guidelines, I am of the opinion that the following items which the United States Attorney seeks to have disclosed to the Internal Revenue Service are not matters occurring before the grand jury and do not require a 6(e) order for their disclosure: (1) the one page statement prepared for James Baggot by United States Attorney's Office, though later read by him to the grand jury; and the one page "Memorandum to File" written by Scott R. Lassar concerning a meeting with Mr. Baggot he attended on May 4, 1977. The statement read by Mr. Baggot to the grand jury was part of that body's proceedings; transcripts of grand jury testimony containing that statement would be matters occurring before the grand jury. However, the one page statement standing by itself was not composed under the compulsion of a grand jury subpoena and was rendered prior to the witness' appearance before the grand jury. As for the Assistant United States Attorney's "Memorandum to File," it merely reflects information the government had learned through its own investigation of Mr. Baggot independent of his grand jury appearance one month later. Cf. *In Re Grand Jury Investigation*, 610 F.2d 202, 217 (5th Cir. 1980). I find that the five remaining items which the government seeks to disclose to the IRS by this motion are matters occurring before the grand jury. The propriety of disclosing them under Rule 6(e) will now be considered in light of the government's argument that the Examination Division's civil investigation is preliminary to a judicial proceeding.

An exception to the general interdiction against disclosure of matters occurring before the grand jury, Rule 6(e)2(C)(i) permits grand jury material to be released "when so directed by a court *preliminarily to or in connection with a judicial proceeding.*" (emphasis supplied)[6] This language, like the phrase "matters occurring before the grand jury" appeared in the original version of Rule 6(e) as adopted by Congress in 1946. My research indicates that Congress has never expressed itself on the meaning of the operative language of this exception. While it is clear that Congress does not intend by Rule 6(e) to preclude totally "the use of grand jury developed evidence for civil law enforcement purposes," Senate Report No. 95-354, 95th Cong., 1st Sess. 8, *reprinted in* (1977) United States Code and Administrative News, 527, 532, Congress has retained the requirement despite several amendments to Rule 6(e) over the years that disclosures may be made for unrelated purposes only "preliminarily to or in connection with a judicial proceeding." I am convinced, therefore, that even before a court reaches a determination of particularized need, a judicially created requirement which all successful petitions for 6(e) orders must meet (*United States* v. *Proctor & Gamble*, *supra*, at 683-84), it must first be satisfied that the moving party is seeking a disclosure in accordance with the requirement that is expressly contained in Rule 6(e)2(C)(i).

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[6] At the time the government filed this motion, the exception in the text was 2(C)(i). Rule 6(e) was amended in 1979 and the idential language now is contained in Sec. 3(C)(i). 18 U.S.C.A. Rule 6(e)(3)(C)(i) (West Supp. 1980).

In *Doe* v. *Rosenberry*, 255 F.2d 118 (2d Cir. 1958), Judge Learned Hand articulated a definition for the term "judicial proceeding" in the context of Rule 6(e) which subsequently has become a standard reference point for courts dealing with the issue:

> [T]he term "judicial proceeding" includes any proceeding dterminable by a court, having its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime. *Id.* at 120.

A general review of the case law reveals that courts have little difficulty in finding that the requirement of Rule 6(e) is satisfied where a party is seeking disclosure in connection with an ongoing judicial proceeding, or a proceeding which by law will culminate with a judicial proceeding. Pending civil and criminal federal court proceedings, including grand jury proceedings, unquestionably fall within the ambit of the 6(e) language. See, *In Re Minkoff*, 349 F. Supp. 154 (D. R.I. 1972); *In Re Grand Jury Witness Subpoenas*, 370 F. Supp. 1282 (S.D. Fla. 1974). Disclosure of grand jury material also has been permitted in connection with criminal proceedings before state courts, *State of Wisconsin* v. *Schaeffer*, 565 F.2d 961 (7th Cir. 1977), state grand jury proceedings, *In Re Petition For Disclosure of Evidence*, 184 F. Supp. 38 (E.D. Va. 1960), and civil proceedings in state courts. *Doe* v. *Rosenberry, supra; Special February 1971 Grand Jury* v. *Conlisk*, 490 F.2d 894 (7th Cir. 1973). *Doe* and *Conlisk* also can be cited for the proposition that a request for grand jury material for use in hearings being conducted by an administrative body may be permitted as being preliminary to a judicial proceeding where a statutory scheme contemplates judicial review of the body's findings, and the judicial review envisioned by that scheme is a judicial proceeding.[7] And where an administrative body such as a bar grievance committee is conducting hearings as an "arm of the court", at least one court has observed that the hearings themselves are a judicial proceeding. *See, United States* v. *Bates*, No. 79-2162 (D.C. Cir. April 18, 1980) at 4 (dictum). However, where an administrative agency seeks grand jury materials to investigate the possibility of bringing administrative hearings, the better rule is that the investigation is not preliminary to or in connection with a judicial proceeding. *See, United States* v. *Bates*,

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[7] In *Doe* the Grievance Committee of the Association of the Bar of the City of New York had the authority of the Appellate Division of the New York Supreme Court to conduct hearings to determine whether it should recommend to the Appellate Division that disciplinary sanctions be taken against members of the bar. In *Conlisk*, the Chicago Police Department's board of inquiry investigated disciplinary matters involving police officers. If the board ordered punitive action to be taken against the officer, he would be entitled to judicial review by the Circuit Court of Cook County, and then to an appeal of right to the Illinois Appellate Court.

supra; In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962).

In support of its contention that the Examination Division's investigation of Mr. Baggot's civil tax liability is preliminary to a judicial proceeding, the government has called my attention to *Patrick* v. *United States*, 524 F.2d 1109 (7th Cir. 1975), and *In Re December 1974 Term Grand Jury Investigation*, 449 F.Supp. 743 (D. Md. 1978). *Patrick* is cited by the government for the following proposition:

> The language of . . . [Rule 6(e)] . . . gives the district court power to permit disclosure "preliminarily to or in connection with a judicial proceeding." In this case the district court could reasonably anticipate that judicial proceedings would arise out of a contest over Patrick's failure to file any gambling tax returns when he admittedly had received such income. *United States* v. *Patrick, supra* at 1117.

However, the Seventh Circuit was not considering the transfer of transcripts to the IRS as an isolated matter. The Court of Appeals was confronted with the issue of whether a district court had properly dismissed a motion by Patrick seeking an injunction preventing the government from using transcripts of his own grand jury testimony in an IRS jeopardy assessment against him; the transcripts had been released to the IRS under a Rule 6(e) order without notice to Patrick. But an action seeking effectively to enjoin the assessment or collection of federal taxes is barred by the Anti-Injunction Statute, 26 U.S.C. Sec. 7421(e), unless "the government should have known, at the time it made the assessment, that it had no chance of prevailing on the merits." *United*

States v. *Patrick, supra,* at 1115. In light of that stringent standard and the "broad discretion conferred on the district court by Rule 6(e)," the court concluded that the district court did not err in denying the injunction against use of the transcript. The actual holding in *Patrick*, persuades me that the government's reliance upon it as authority for its position here is misplaced.

I have reviewed thoroughly Judge Miller's well-drafted opinion in *In Re December 1974 Term Grand Jury Investigation.* That case presents a factual situation almost identical to the one before me. Judge Miller indicated that he would permit disclosure if two conditions were met: (1) a government official demonstrated under oath that the grand jury proceeding was not used as a subterfuge to obtain information for civil purposes; and (2) and the government show *ex parte* that the material sought to be disclosed "have some rational connection with a specific existing or contemplated judicial proceeding." *Id.* at 751. I do not find it necessary to disagree with Judge Miller's conclusion which was cited approvingly by the 4th Circuit, *In Re Grand Jury Subpoenas, April 1978*, 581 F.2d 1103, 1110, (4th Cir. 1978), though I would require more than a rational connection between the materials and the judicial proceedings, since Congress by its 1977 amendments to Rule 6(e) did not expressly lift the judicially-created stricture that petitioners under 6(e)2(C)(i) demonstrate a particularized need for the grand jury materials.

I am of the opinion in the instant case that the government has not established that it is seeking the matters in question preliminarily to or in connection with a judicial proceeding. The IRS' need for the grand jury information at this juncture is simply administrative. A perusal of the Internal Revenue Code, reveals that the IRS cannot become a part of a civil judicial proceedings under any circumstances unless it first has calculated a deficiency and confronted the taxpayer with it.

If the taxpayer chooses, he can pay the deficiency on the spot and the matter will be ended. If he chooses neither to pay nor to challenge the assessment in court, IRS can levy upon his properties and get its money. As of this very moment, the IRS has not yet become a party to a judicial proceeding involving Mr. Baggot nor can it unless he contests its computations after having been served with a notice of deficiency. The preogative of initiating these proceedings belongs exclusively to Mr. Baggot; not to the IRS. In light of my understanding of IRS procedures and my reading of what Congress intended when it said disclosures may be made "preliminarily to or in connection with a judicial proceedings, I am constrained to not grant the government's motion on the basis of a Rule 6(e) motion.

Despite this conclusion, I am persuaded, that I should use my general supervisory powers over the grand jury to order disclosure of all of the materials. Once a grand jury has completed its work, documents should be returned to their owners, or put to some use commensurate with good governmental purposes. The United States Attorney's Office should not be made to become a vast warehouse storing thousands of documents presented to grand juries which long since have been discharged and used in trials which long since have been completed. The transcripts, and other grand jury materials in this case are to be used merely to establish the civil tax liability of a man who has pleaded guilty to an information, and as the government has stated, has made "a formal public acknowledgement of his guilt." This acknowledgment relates to a tax deficiency which no longer can ever become the part of a criminal proceedings, because of the agreement between the taxpayer and the government. And this disposition of the materials can result in no legally recognized injury to anyone—not even to Mr. Baggot.

From time to time the government requests under the general common-law supervisory powers of the court, authority or directions for meaningful disposition of matters no longer usable by the grand jury, and lying dormant in old files in the government's office. Requests for orders authorizing the disposal of guns, of narcotics, of degenerating materials, for example, are ordinarily and regularly made and allowed. The government's role becomes that of a burdened bailee on behalf of a grand jury that no longer exists, and in time on behalf of the court of which the grand jury was an arm. It is this common-law supervisory power of the court which is called into play to see to it that a meaningful and intelligent disposition of such material is made.

This is an unique case—rendered particularly unique because not even before another grand jury could this same material be put to use. Its only useful disposition is that requested by the government. No application of Rule 6(e) is thus needed or involved.

ENTER:

/s/ James B. Parsons
JAMES B. PARSONS
United States District Judge

Dated: July 2, 1980

APPENDIX D

Opinion by Judge Wood
Judge Pell concurring in part and dissenting in part

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
June 25, 1981

Before

Hon. WILBUR PELL, JR., *Circuit Judge*

Hon. HOWARD T. MARKEY, *Judge**

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

No. 80-1999

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 76-GJ-534

JAMES B. PARSONS, *Judge*

IN RE: THE SPECIAL FEBRUARY, 1975 GRAND JURY

SPECIAL APRIL, 1977 GRAND JURY

APPEAL OF: JAMES E. BAGGOT

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* The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED AND REMANDED, with instructions, in accordance with the opinion of this Court filed this date.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1982 371341 860

Opposition

Office - Supreme Court, U.S.
FILED
JUN 1 1982
ER L. STEVAS,
CLERK

No. 81-1938

In The

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES E. BAGGOT,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the government's request for disclosure of grand jury materials to the Internal Revenue Service for a civil investigation of possible tax deficiency, without having established a compelling and particularized need therefor, was properly denied by the Court of Appeals as not "preliminarily to or in connection with a judicial proceeding" pursuant to Federal Rule of Criminal Procedure 6(e)(3)(C)(i).

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

FEDERAL RULE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT:

I.

The Decision Below Correctly Maintained Grand Jury Secrecy 11

A. Disclosure Is Barred By Lack Of Particularized Need 11

B. Disclosure Is Not Preliminarily To A Judicial Proceeding 15

II.

There Is No Significant Conflict Of Appellate Decisions 17

III.

The Question Presented Does Not Warrant Supreme Court Review 23

A. The *Baggot* Decision Does Not Impede The Collection Of Taxes 23

B. The *Baggot* Decision Is Consistent with The Legislative History Of Rule 6(e) 25

CONCLUSION 28

APPENDICES:

A—Federal Rule Involved—Fed.R.Crim.P. 6(e) ... 1a

B—Letter—James Kopidlansky, Chief, Examination Division ... 3a

TABLE OF AUTHORITIES

Cases

Doe v. Rosenberry, 255 F.2d 118 (2nd Cir. 1958) ... 20

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) ... 10, 12, 22

Illinois Petition v. Widmar, 1981 Trade Cases (CCH) 63,771 (N.D. Ill. 1981) ... 22

In re Application of the United States for an Order Pursuant to the Provisions of Rule 6(e), Federal Rules of Criminal Procedure, 505 F. Supp. 25 (W.D. Pa. 1980) ... 22

In re April 1977 Grand Jury Proceedings, 506 F.Supp. 1174 (E.D. Mich. 1981), *appeal pending*, No. 80-1182 (6th Cir.) ... 9, 22

In re December 1974 Term Grand Jury Investigation, 449 F.Supp. 743 (D. Md. 1978) ... 19

In re Disclosure of Evidence, 650 F.2d 599 (5th Cir. 1981) ... 22

In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281 (8th Cir. 1978) ... 20

In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962) ... 22

In re Grand Jury Subpoenas, April, 1978 At Baltimore, 381 F.2d 1103 (4th Cir. 1978) ... 19

In re J. Ray McDermott & Co., 622 F.2d 166 (5th Cir. 1980) ... 20-21, 22

In re Judge Elmo B. Hunter's Special Grand Jury, 667 F.2d 724 (8th Cir. 1981) 17, 18-19, 20

In re 1978-1980 Grand Jury Proceedings, 503 F.Supp. 47 (N.D. Ohio 1980) 22

In re Perlin, 589 F.2d 260 (7th Cir. 1978) 26

Patrick v. United States, 524 F.2d 1109 (7th Cir. 1975) 19-20

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959) 11, 12, 24, 25

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Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973) 9, 20

United States v. Interstate Dress Carriers, 280 F.2d 52 (2d Cir. 1960) 10

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United States v. Sells Engineering, Inc., No. 81-1032 14

United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980) 20, 24

United States v. Stanford, 589 F.2d 285 (7th Cir. 1978) 10

United States v. Young, 494 F.Supp. 57 (E.D. Tex. 1980) 22

Statutes and Rules

7 U.S.C. §1 *et seq.* 2

7 U.S.C. §6(c) 3

15 U.S.C. §717 *et seq.* 21

18 U.S.C. Fed. R. Crim. P.:
  Rule 6(e) .... *passim*
  Rule 6(e)(2) 26
  Rule 6(e)(2)(C)(i) 4

Rule 6(e)(3) 12
Rule 6(e)(3)(A)(ii) 26
Rule 6(e)(3)(B) 26
Rule 6(e)(3)(C)(i) .... *passim*

26 U.S.C. §§6201-6216 15

26 U.S.C. §6213(a) 16

26 U.S.C. §6213(c) 16

26 U.S.C. §7602 7

26 U.S.C. §§7602-09 24

28 U.S.C. §1340 16

28 U.S.C. §7421(a) 19, 20

Other Authorities

Annual Reports of the Commissioner of Internal Revenue, 1979 and 1980, Table 12 15

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Reg. §601.103(c)(3) 16
Reg. §601.105(b)(4) 16
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Reg. §601.106(d)(2) 16
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Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 95th Cong., 1st Sess., on Proposed Amendments to the Federal Rules of Criminal Procedure (1977) 27

In The

Supreme Court of the United States

October Term, 1981

No. 81-1938

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES E. BAGGOT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, 1a-26a) is reported at 662 F.2d 1232. The supplemental opinion of the Court of Appeals upon rehearing (Pet. App. B, 28a-32a) is reported at 662 F.2d 1243. The memorandum opinion and order of the district court (Pet. App. C, 33a-48a) is not reported.

JURISDICTION

Respondent adopts the jurisdictional statement of Petitioner (Pet. 2).

FEDERAL RULE INVOLVED

Federal Rule of Criminal Procedure 6(e),
see App. A, *infra*, 1a-2a

STATEMENT OF THE CASE

In May of 1976, the government, through the Special February, 1975 Grand Jury, started a massive investigation of commodities futures trading on the Chicago Board of Trade. The investigation continued with the Special April, 1977 Grand Jury which returned numerous indictments against commodity traders for violations of the Commodity Exchange Act (7 U.S.C. §1 *et seq.*), Internal Revenue Service ("IRS") laws, conspiracy and mail fraud.

Respondent, James E. Baggot, (now 79 years old), had been a floor trader at the Chicago Board of Trade for 41 years and became a grand jury target.

On May 2, 1977, two IRS agents appeared at Respondent's home and questioned him extensively. Respondent answered all of their questions. After questioning, the agents served Respondent with a grand jury subpoena calling for his appearance before the Special April, 1977 Grand Jury on May 4, 1977. The subpoena called for Mr. Baggot's appearance at Room 1500 in the Federal Building which is the office of the United States Attorney.

Without counsel and pursuant to subpoena Respondent appeared at the office of the United States Attorney on May 4, 1977. At that time Respondent was taken to the office of an Assistant United States Attorney ("AUSA") and not to the grand jury room. The AUSA told Respondent that if he "told the truth" he would not have to appear before the grand jury and for that reason Respondent consented to be interviewed. Respondent was interviewed by government attorneys and made admissions of wrongdoing. At the end of the interview the AUSA told Respondent "to get a lawyer". Respondent was not taken before the grand jury at that time. After the interview AUSA Scott Lassar prepared a "Memorandum to File" relating to the May 4, 1977, interview which is one of the items now sought to be disclosed. ("Lassar Memorandum").

Respondent retained his present counsel on May 5, 1977. Pursuant to plea negotiations Respondent was interviewed by AUSAs with counsel present. The government prepared a statement which Respondent agreed to read to the grand jury. The statement, which was read verbatim by Respondent, constituted his entire testimony before the grand jury. That statement is one of the grand jury records sought for disclosure.

On June 16, 1977 a plea agreement was entered which provided that Respondent's criminal exposure would be limited to a two count information charging violations of 7 U.S.C. §6(c) (misdemeanors) and that he would plead guilty to same. The plea agreement further provided that Respondent would terminate his activities as a floor trader and broker at the Chicago Board of Trade and would cooperate with the government.

A two count information was filed (77 CR 564) by the United States Attorney and on June 24, 1977, Mr. Baggot pled guilty to the information per his plea agreement. On September 16, 1977 Respondent was placed on probation for one year and ordered to pay a $30,000.00 fine.

On March 8, 1978, the United States Attorney moved the district court for an order under Fed.R.Crim.P. 6(e)(2)(C)(i)[1] to grant access to agents of Internal Revenue Service to "the subpoenaed books, records, documents, materials and transcripts . . . of the Special February, 1975 and Special April, 1977 Grand Juries" for use preliminarily to or in connection with judicial proceedings relating to the civil tax liability of James E. Baggot. On June 14, 1978, the district court denied that motion. The district court held that the government had not shown a "particularized need" under *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958) and that its request was not for use preliminarily to or in connection with a judicial proceeding. (Pet. App. C, 35a).

On June 22, 1978, the government sought permission from the district court to deliver to IRS for the purpose of establishing Respondent's "civil tax liability" certain grand jury materials claiming that they were not "matters occurring before the grand jury". Pursuant to Respondent's motion to restrain disclosure the district court filed a Memorandum Opinion and Order dated October 25, 1978 granting the motion holding that the materials sought were matters occurring before the grand jury.[2]

Next, the United States Attorney directed a letter to counsel for Respondent stating that he intended to transmit to the civil division of IRS certain matters of public record which related to the criminal matter involving Respondent: such as the information, a transcript of the guilty plea and a transcript of sentencing. Respondent again moved to restrain and the district court denied Respondent's motion on December 6, 1978. The materials were transmitted to IRS on December 15, 1978.

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[1] Now designated 6(e)(3)(C)(i), (App. A, *infra*, 2a).

[2] The government filed a notice of appeal on December 26, 1978 from the Memorandum Opinion and Order of Judge James B. Parsons entered on October 25, 1978. The government's appeal was withdrawn with the Court of Appeals' approval on February 5, 1979.

Thereafter, the Chief, Examination Division, IRS wrote the United States Attorney noting that the materials received revealed that Respondent ". . . had avoided and possibly evaded his taxes . . ." and requested a "Rule 6(E)[sic] order for civil purposes" (App. B, *infra*, 3a-4a).

On February 27, 1979, the United States Attorney again filed a motion for disclosure of matters occurring before the subject grand juries. Again, the government sought disclosure to IRS "for use preliminarily to or in connection with judicial proceedings relating to the civil tax liability of" Respondent. This time the district court granted the disclosure motion. First, reconsidering, *sua sponte*, its earlier ruling the court held:

1. the statement prepared for Respondent by the government and which he read to the grand jury was not a matter occurring before the grand jury under Rule 6(e);
2. a "Memorandum to File" prepared by AUSA Scott Lassar relating to the interview of Respondent on May 4, 1977, at the office of the government, but which was secured pursuant to a grand jury subpoena, was not a matter occurring before the grand jury under Rule 6(e).

The court then found that the remaining materials sought by the government were covered by the rule of grand jury secrecy (Pet. App. C, 37a-42a).

The district court further found that grand jury materials sought could not be released under Rule 6(e)(3)(C)(i) (Pet. App. C, 42a-47a) because "where an administrative agency seeks grand jury materials to investigate the possibility of bringing administrative hearings the better rule is that the investigation is not preliminary to or in connection with a judicial proceeding." (*id.* at 44a). The court noted that "The IRS' need for the grand jury information at this juncture is simply administrative" because "IRS cannot become a part of civil judicial proceedings under any circumstances unless it first has calculated a deficiency and confronted the taxpayer with it." (*id.* at 46a-47a). Surprisingly the court then granted the disclosure motion pursuant to its "general supervisory powers over the grand jury" (*id.* at 47a).

Respondent appealed and a stay was granted. Respondent argued: (1) the district court improperly exercised its supervisory powers; (2) all the grand jury materials sought for disclosure to IRS were matters occurring before the grand jury entitled to protection under Rule 6(e); (3) IRS' request for disclosure was not preliminarily to or in connection with a judicial proceeding under Rule 6(e)(3)(C)(i); (4) the government made no showing of particularized need for disclosure of grand jury materials; and (5) the grand jury may not be used as a civil investigative tool.

The government argued that most of the information sought to be disclosed were not matters occurring before the grand jury; that the court should have disclosed the material pursuant to Rule 6(e); and that the court properly ordered disclosure under its supervisory powers.

The court of appeals reversed. Circuit Judge Harlington Wood Jr., rejected the district court's exercise of supervisory powers in allowing disclosure (Pet. App. A, 9a-12a). Citing this Court's pre-eminent decision in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), the court of appeals stated that despite the importance of taxes, their determination, assessment and collection do not constitute the type of extraordinary and compelling need necessary for disclosure in the interest of justice under Rule 6(e). In support of this conclusion, the court noted that IRS had other effective statutory means under 26 U.S.C. §7602 to accomplish its civil purposes. Pointing to the fact that no failure of civil process had been demonstrated in the record, the court rejected the government's claim that this particular IRS investigation was stymied. The dangers inherent in the government's "practical short cut" led the court to deny disclosure of the grand jury materials and to compel the government to utilize its "alternative independent civil means" for discovery. The court found that wholesale disclosure to IRS might impact upon future grand juries by discouraging free and untrammeled disclosures. The court further cautioned that even though a liberal disclosure policy would facilitate tax collection it would also create a temptation to abuse the grand jury process.

The court of appeals next held that essentially all of the grand jury materials sought to be disclosed were matters occurring before the grand jury under Rule 6(e) (Pet. App. A, 12a-15a). The court described the statement prepared by the government for Respondent to read before the grand jury as "no ordinary business document" (*id.* at 13a). That the statement constituted the bulk of Respondent's grand jury testimony and resulted from Respondent's response to a grand jury subpoena led the court to conclude that the statement was "too grand jury related to be artificially distinguished from the transcript of its reading to the grand jury" and was therefore protected by Rule 6(e) (*id.* at 13a).

The court of appeals accorded Rule 6(e) protection to the Lassar Memorandum on the grounds that it was spawned by the grand jury subpoena issued to Respondent and was used to assist the government in preparation of the statement read by Respondent to the grand jury. The court noted that Respondent, obeying the subpoenas' command to appear, was persuaded to tell the truth to the AUSA in order to avoid actually testifying before the grand jury that day. The court found the Lassar Memorandum not to be "any less grand jury related than the Baggot statement itself" (Pet. App. A, 14a).

With respect to the IRS Special Agent's Report the court found that it summarized grand jury testimony, analyzed grand jury documents, included reports of interviews of grand jury witnesses and made recommendations therefrom. Consequently, the court held that, the Report was protected by Rule 6(e) except for those limited parts which could be clearly divorced from the grand jury proceedings. The court further determined "all the additional materials sought to be disclosed, the business records, letter and witness testimony as also being 'matters occurring before the grand jury' and therefore subject to Rule 6(e)." (Pet. App. A, 15a).

The court of appeals then addressed the issue which the government now asks this court to review and held that disclosure of grand jury materials to IRS for its use in a civil tax investigation is not "preliminarily to . . . a judicial proceeding" under the secrecy exception of Rule 6(e)(3)(C)(i) (Pet. App. A, 15a-19a). The court of appeals agreed with the district court that IRS' need for grand jury materials was merely administrative, concluding:

> The option of litigation rests with the taxpayer who may choose to pay any deficiency assessed if one is even assessed. At least at the present time before any deficiency has even been assessed, the disclosure sought clearly cannot be considered as being in connection with an actual judicial proceeding. The only possibility is that disclosure might be considered to be preliminary to a judicial proceeding.

> We agree with Chief Judge Parsons that the present Internal Revenue Service civil investigation of Baggot's possible additional tax liabilities is too embryonic, speculative, and uncertain to firmly say that it is "preliminarily to" a judicial proceeding. See In re April 1977 Grand Jury Proceedings, 506 F.Supp. 1174 (E.D. Mich. 1981) (and the cases cited therein).
>
> It is at best, with no judicial proceeding now pending and with the possibility that none may result only preliminary to and in connection with not a judicial proceeding, but a type of administrative proceeding or investigation. (Pet. App. A, 15a-16a):

The court of appeals' opinion distinguished one of its prior decisions, *Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973) ("*Conlisk*") and stated that the exception contained in Rule 6(e)(3)(C)(i) "is not so flexible as to cover the present Internal Revenue Service administrative interest in taxes." (Pet. App. A, 17a). Accordingly, the court found that Respondent's possible tax deficiency was "not of such consequence as to justify the fashioning of a special judicial exception to grand jury secrecy." (Pet. App. A, 18a-19a).

Judge Pell concurred with the court's disapproval of the district court's exercise of supervisory powers, but dissented from the court's denial of disclosure to IRS under Rule 6(e)(3)(C)(i).

A majority of the original panel voted to deny the government's Petition for Rehearing and a majority of the active members of the court voted to deny a rehearing en banc (Pet. App. B, 27a-28a). The order denying the government's petition was accompanied by the Supplement to the Majority Opinion, written by Circuit Judge Harlington Wood, Jr. (Pet. App. B, 28a-30a). Judge Pell also filed a Supplemental Concurrence and Dissent (Pet. App. B, 31a-32a).

Judge Wood's supplemental opinion specifically addressed the applicability of Rule 6(e) to the commodity trading records subpoenaed by the grand jury. The court supported the district court's analysis of grand jury documents as constituting "matters occurring before the grand jury" under Rule 6(e). The court agreed with Respondent's statement that the documents were "the 'essence' of the grand jury inquiry." (Pet. App. B, 29a).

Fearful of the so-called "intrinsic value" test, the court had little difficulty in distinguishing *United States v. Stanford*, 589 F.2d 285 (7th Cir. 1978) and *United States v. Interstate Dress Carriers*, 280 F.2d 52 (2d Cir. 1960). Instead, the court cited *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979) and *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958) for the principle that policies favoring grand jury secrecy must be given due weight (Pet. App. B, 29a).

Finally, the court limited its decision to the facts of this particular case by stating it was not holding that all third party documents subpoenaed by a grand jury forever remain immune for any other use (Pet. App. B, 30a). The court advised that the applicability of Rule 6(e) to subpoenaed documents must be considered "in the context of the particular grand jury investigation" in order to determine if some secret aspect of the grand jury investigation is revealed.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW CORRECTLY MAINTAINED GRAND JURY SECRECY

The decision of the court of appeals correctly maintained the cloak of grand jury secrecy. Judge Wood's well-reasoned opinion fully addressed the criteria for disclosure of secret grand jury materials under Rule 6(e) and carefully adhered to the teachings of this Court.

The government's motion for disclosure of grand jury materials to IRS failed for two fundamental reasons.[3] First, absolutely no showing of compelling and particularized need for disclosure was made by the government. *United States v. Procter & Gamble, Co.*, 356 U.S. 677, 681-82 n.6 (1958); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959). Second, the government failed to demonstrate in the district court and the court of appeals that disclosure in the present case was preliminarily to or in connection with a judicial proceeding under Rule 6(e)(3)(C)(i). Both tests must be satisfied for disclosure under Rule 6(e).

A. Disclosure Is Barred By Lack Of Particularized Need.

This Court established the test for disclosure of grand jury materials for civil proceedings in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), holding that grand jury transcripts would not be disclosed to a defendant in a civil antitrust action because grand jury secrecy "must not be broken except where there is compelling necessity" which "must be shown with particularity". 356 U.S. at 682. That test has been retained by this Court in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) (the burden "is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy.") and in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 221-223 (1979).[4] *Douglas Oil* further established that grand jury secrecy is not eliminated because the grand jury investigation has ended. Therefore, "courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries." 441 U.S. at 221. This Court's decisions in *Procter & Gamble* and *Douglas Oil* warn that disclosure of grand jury materials might discourage free and untrammeled disclosures by persons who have information with respect to crimes. *Procter & Gamble*, 356 U.S. 677, 681-682 n.6 (1958); *Douglas Oil*, 441 U.S. 211, 219-223 (1979). Only where the need for disclosure is compelling and concrete will the interest in grand jury secrecy be overcome.

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[3] It is important to note that for the purpose of this case the government concedes that the items sought are "matters occurring before the grand jury" within the meaning of Rule 6(e) (Pet. 14, n.8).

This Court ought not upset the court of appeals' and the district court's measured observance of the established requirements for lifting the protective veil of secrecy surrounding grand jury materials. The district court denied the government's second motion for disclosure on the grounds that the government failed to establish with particularity a need for the grand jury materials and that its request was not preliminary to a judicial proceeding (Pet. App. C, 35a). The government never cured those defects but attempted to persuade the court of appeals that it need only show that the grand jury materials were "rationally related" to civil matters under investigation (Gov't. Br. p. 11). The government's novel standard for disclosure was rejected by the court of appeals which held that the collection of taxes does not satisfy the compelling and particularized need requirement of *Procter & Gamble* (Pet. App. A, 10a). Neither Rule 6(e) nor decisions of this Court condones the standard urged by the government or confers on the government a special status mandating disclosure.

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[4] *Douglas Oil* further articulated standards for disclosure by stating that parties seeking grand jury materials under Rule 6(e) "must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the continued need for secrecy, and that their request is structured to cover only material so needed." 441 U.S. at 222. When the application of Rule 6(e) is analyzed in the light of *Procter & Gamble* and *Douglas Oil* it is manifest that disclosure is a two step process; 1) the movant must satisfy one of the exceptions under Rule 6(e)(3); and 2) the court must then apply the tests enunciated in *Procter & Gamble* and *Douglas Oil* to determine if disclosure is justified.

The court of appeals specifically found that the purpose for which disclosure in the present case was sought was not a compelling and particularized need and that disclosure to IRS would have a detrimental impact upon future grand juries. Recognizing the concerns expressed by this Court, the court of appeals found that disclosure might discourage future grand jury witnesses from making free and untrammeled disclosures (Pet. App. A, 11a). See *Procter & Gamble*, 356 U.S. at 681-82 n.6.

The Seventh Circuit also expressed concern that disclosure in tax cases would create a temptation to abuse the grand jury process (Pet. App. A, 12a). The court's regard for future grand jury abuse is well-founded from the context in which this matter arose. Disclosure of grand jury materials in this case is being sought at the request of IRS pursuant to a letter from the Chief of Examination Division (App. B, *infra*, 3a-4a). That letter in effect says, "cull through all your grand jury materials Mr. United States Attorney and send us anything we might need to determine if there is a tax liability". This letter represents the same type of general, unparticularized request that was rejected by this Court in *Procter & Gamble*. It illustrates the real potential for serious grand jury abuse in every case with possible tax ramifications and how a grand jury can be manipulated for civil purposes. The temptation to abuse the grand jury system would be even greater if, as the government claims, it has a lesser burden for disclosure.[5]

It is clear that IRS would swiftly abandon its vast array of discovery tools, as it has done in the present case, if it could have access to grand jury materials. The potential for grand jury abuse would be enormous since the spectre of IRS would loom over every grand jury impanelled. Unparticularized general requests for disclosure, similar to the aforesaid letter, would be routinely issued to any U.S. Attorney in whose district a grand jury was investigating tax related matters. Every grand jury would have dual purposes, criminal and civil. The enormous potential for subversion and destruction of the grand jury system runs afoul of this Court's steadfast allegiance to grand jury secrecy. The court of appeals astutely recognized the harmful effects that disclosure might have on future grand juries and properly held that the grand jury materials herein require protective secrecy under Rule 6(e).[6]

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[5] The government's Petition makes note that the standard for disclosure of grand jury materials under Rule 6(e)(3)(C)(i) is presented for review in *United States v. Sells Engineering, Inc.*, No. 81-1032. (Pet. 10 n.6, 13 n.7, 24 n.6).

[6] The fact that the grand jury materials may be useful and relevant to IRS is of no moment, *Procter & Gamble*, *supra*, at 682. If usefulness was the measure for disclosure, Rule 6(e) would be emasuculated.

B. Disclosure Is Not Preliminarily To A Judicial Proceeding.

The Seventh Circuit carefully examined the judicial proceeding exception and correctly determined that disclosure to IRS would not be "preliminarily to" a judicial proceeding. The government's conclusory assertion that the ascertainment, assessment and collection of taxes are designed to culminate in judicial proceedings whenever necessary to resolve civil tax disputes (Pet. 20-21) is unpersuasive because it ignores the fact that tax matters rarely result in judicial proceedings.[7] There has been *no assessment of taxes* against Respondent and whether there is or is not a judicial proceeding relating to his tax liability, if any, rests solely and exclusively with Mr. Baggot. Thus, it is the decision of the taxpayer, not of IRS, that determines whether there will be a judicial proceeding.

IRS has a plethora of non-judicial, administrative tools available to it by statute, rule and regulation to establish civil tax liability. The Internal Revenue Code generally provides that income taxes may not be assessed until IRS sends the taxpayer a Notice of Deficiency, 26 U.S.C. §§6201-6216. The panoply of administrative prerequisites to a Notice of Deficiency are set forth, *inter alia*, in the Federal Tax Regulations. Those regulations state the procedure for investigation and audit of a taxpayer's return and for administrative determinations in the event the taxpayer does not agree with the auditing results:

> At the conclusion of an office or field examination, the taxpayer is given an opportunity to agree with the findings of the examining officer. If the tax-

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[7] 92% of ordinary tax audits are resolved at the audit level, others are settled on administrative appeals, and less than 1% result in litigation. Annual Reports of the Commissioner of Internal Revenue, 1979 and 1980, Table 12.

> payer does not agree, the examining officer will inform the taxpayer of the appeal rights. If the taxpayer does agree with the proposed changes, the examining officer will invite him to execute either Form 870 or another appropriate agreement form. Fed. Tax Regs. Vol. 3 (1982) §601.105(b)(4) (hereinafter "Reg. §.....").

Thus, if the taxpayer agrees with the findings of the examining officer, the tax is assessed and the matter ends.

Should a taxpayer disagree with the findings of an examining agent, he is afforded the opportunity of an administrative appeal within IRS to the Appeal Office [Reg. §601.106(a), (b)]. At the appellate administrative level the taxpayer may agree with the findings of the examining agent and thus conclude the matter by executing Form 870-AD [Reg. §601.106(d)(2)].

If there is no agreement at the administrative level, IRS may issue a 90 day Notice of Deficiency. The Notice of Deficiency gives the taxpayer the option, within 90 days, to do one of the following:

1. pay the tax and conclude the matter;
2. file a petition in the Tax Court of the United States challenging the deficiency [26 U.S.C. §6213(a)];
3. pay the tax and file a claim for a refund with IRS in order to obtain standing to sue the United States in the United States District Court for said refund [Reg. §601.103(C)(3), 28 U.S.C. §1340];
4. do nothing, have the tax assessed after 90 days, pay the tax and conclude the matter [26 U.S.C. §6213(c)].

Thus, there is no doubt that it is entirely within the discretion of a taxpayer as to whether or not there will be a judicial proceeding. It is misleading for the government to claim that the grand jury material is sought "for use preliminarily to or in connection with judicial proceedings relating to the civil tax liability" of Respondent. There is no tax assessment against Respondent. If an assessment is made the government has no idea whether there will be a judicial proceeding and no control over whether such a proceeding will occur. There is no proceeding pending against Respondent and there can be no judicial review, contemplated or otherwise, of a nonexistent proceeding.

After considering the foregoing, the Seventh Circuit, in its well-reasoned decision, concluded (Pet. App. A, 16a):

> [T]he present Internal Revenue Service civil investigation of Baggot's possible additional tax liabilities is too embryonic, speculative, and uncertain to firmly say that it is "preliminarily to" a judicial proceeding. [citations omitted]
>
> It is at best, with no judicial proceeding now pending and with the possibility that none may result only preliminary to and in connection with not a judicial proceeding, but a type of administrative proceeding or investigation.

Respondent submits that the government's proposition, carried to its logical conclusion, would make a mockery of the statutory safeguard of the judicial proceeding exception and would precipitate a significant abrogation of grand jury secrecy.

II.

THERE IS NO SIGNIFICANT CONFLICT OF APPELLATE DECISIONS

Contrary to the government's Petition, the decision of the court of appeals is not in conflict with *In re Judge Elmo B. Hunter's Special Grand Jury*, 667 F.2d 724 (8th Cir. 1981). Because the *ratio decidendi* of each case is confined to its unique factual situation there is no conflict which this court need resolve by granting *certiorari.*

In *Hunter's Special Grand Jury* the district court made a specific finding of particularized need which the Eighth Circuit affirmed. 667 F.2d at 725, n. 2 and 728. In the instant case, there was no finding of particularized need.[8]

In this case, the critical factor of particularized need is lacking. Both the court of appeals and the district court assessed the government's request for disclosure and determined that the government had not shown a particularized need (Pet. App. A, 10a). Thus, the court of appeals logically concluded that disclosure in this setting was not preliminarily to a judicial proceeding. The Seventh Circuit's decision that disclosure was not preliminarily to a judicial proceeding was not determinative since disclosure was nevertheless barred by the lack of particularized need.[9] For that reason *Hunter's*

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[8] Although particularized need is a separate condition for disclosure, it is interrelated with the criteria for the judicial proceeding exception of Rule 6(e)(3)(C)(i). The government is thus required to show its specific need for the grand jury materials for use in or preliminary to a judicial proceeding. Clearly, the finding of particularized need in *Hunter's Special Grand Jury* significantly influenced the court's decision to permit disclosure under Rule 6(e)(3)(C)(i).

[9] This distinguishing aspect of the appellate decisions bears direct significance to this Court's threshold analysis of *certiorari.* The lack of particularized need in the case *sub judice* provides the Court with the opportunity to affirm the decision of the Seventh Circuit on the basis of *Procter & Gamble* and its progeny without addressing the question presented for review regarding Rule 6(e)(3)(C)(i). Further, this element of the case raises the question of ripeness for the Court's review since resolution of the question presented in the government's favor would still not obtain disclosure of the grand jury materials due to lack of particularized need, thereby rendering the decision of the Court an advisory opinion.

(Footnote continued on following page)

Special Grand Jury creates no conflict with the decision in this case.

The government also suggests that *Baggot* conflicts with several other cases (Pet. 16 n.10). An analysis of the cited cases reveals no conflict. In *In re Grand Jury Subpoenas, April 1978, At Baltimore*, 581 F.2d 1103 (4th Cir. 1978) the court was not called upon to rule on a 6(e) disclosure order. There petitioner sought a writ of mandamus seeking an evidentiary hearing alleging that the Justice Department and IRS had abused the grand jury process by using the grand jury as a subterfuge to gain access to grand jury materials for use in a civil investigation. The Fourth Circuit dismissed the Petition for Mandamus holding that petitioners rights to non-disclosure were secured by Rule 6(e). 581 F.2d at 1110. Likewise *In re December 1974 Term Grand Jury Investigation*, 449 F.Supp. 743 (D. Md. 1978) presents no conflict. In that case the district court neatly ran around the end of the particularized need pronouncement of this Court in *Procter & Gamble* by dismissing it as *dicta*. 449 F. Supp. at 748. Lastly *Patrick v. United States*, 524 F.2d 1109 (7th Cir. 1975) does not present a conflict. In *Patrick* the taxpayer sought to enjoin the government from using transcripts of his grand jury testimony, which had been released to IRS, in an IRS jeopardy assessment against him. Such an injunction is barred by the Anti-Injunction Statute [28 U.S.C. §7421(a)] unless "the government should have known, at the time it made the assessment, that it had no chance of prevailing on

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[9] *continued*

Likewise, it is noteworthy that the Seventh Circuit stated in its Supplement to the Majority Opinion that its holding applied only to those grand jury materials which "reveal some secret aspect of the grand jury investigation" and not to all third party documents subpoenaed by a grand jury (Pet. App. B, 30a).

the merits." 524 F.2d at 1115. The Seventh Circuit concluded that the district court did not err in denying the injunction in light of the stringent requirements of §7421(a). 524 F.2d at 1117. Contrary to Petitioner's assertions none of the three aforesaid cases is consistent with *Hunter's Special Grand Jury* nor do they conflict with *Bagyot.*

The cases which Petitioner relies upon at page 18 are not inapposite to the decision of the Seventh Circuit. *United States v. Sobotka,* 623 F.2d 764, 768 (2nd Cir. 1980) (disclosure *denied* because no showing of particularized need); *In re Disclosure of Testimony Before the Grand Jury (Troia),* 580 F.2d 281, 284, 286 (8th Cir. 1978) (disclosure granted only after finding of particularized need by district and appellate courts); *Special February 1971 Grand Jury v. Conlisk,* 490 F.2d 894, 897 (disclosure granted after finding of particularized need and unlike the instant case, charges were pending before the police board so there was a proceeding *in esse*). See also Pet. App. A, 16a-17a; *Doe v. Rosenberry,* 255 F.2d 118, 119 (2nd Cir. 1958) (charges pending before grievance committee and decided prior to *Procter & Gamble,* thus issue of particularized need not addressed).

Despite Petitioners argument (Pet. 20 n. 12) there is no confusion surrounding Rule 6(e)(3)(C)(i). Petitioner seeks to set up a straw man by emphasizing the court of appeals' reliance on *In re J. Ray McDermott & Co.,* 622 F.2d 166 (5th Cir. 1980) ("*McDermott*") (Pet. 19 n. 12). The Seventh Circuit gave no undue weight to *McDermott* (Pet. App. 16a-18a, n. 11). Furthermore, Petitioner's attempt to distinguish *McDermott* illustrates the infirmity of its argument. The government argues that the similar denial of disclosure in *McDermott* was because "the Fifth Circuit relied heavily upon FERC's apparent indisposition to actually initiate a judicial proceeding. See

622 F.2d at 171." (Pet. 20 n. 12). That indisposition applies with equal force to the conduct of IRS in this case. The applicable language from the Fifth Circuit states:

> When it petitioned the district court for disclosure, FERC had not attempted to subpoena any witnesses or compel the production of any documents to carry out the investigation which it asserts it began in February 1979. At oral argument FERC's attorney stated that the Commission still had not done so, preferring to rely on disclosed grand jury materials to save time and money.
>
> . . . FERC has not yet brought such an action, issued such an order, or begun on its own to investigate facts which would "cause it to appear to the Commission" that such a violation had occurred or was about to occur. . . . Here, however, FERC has only pointed to its statutory authority to bring such an action. The existence of subsection s [of the Natural Gas Act, 15 U.S.C. §717 *et seq.*] on the statute books coupled with FERC's awareness of an indictment does not transform FERC's *desire* to *investigate* into something "preliminary to or in connection with a judicial proceeding." 622 F.2d at 171 (emphasis supplied).

The status of IRS' investigation is at best a mere possibility and IRS has done nothing except await disclosure of grand jury materials. The government concedes this fact by its reference to "the Service's *proposed* investigation" of Respondent (Pet. 20 n. 12) (emphasis supplied). Thus, in *Baggot* the administrative yen for IRS to investigate the civil tax liability of Respondent does not transform that craving into something preliminary to a judicial proceeding.

Clearly, there is no conflict with, or confusion over, the *Baggot* decision. Quite to the contrary, *Baggot* is consistent with the weight of authority which holds that the mere possibility of a judicial proceeding is not sufficient to qualify for the instant Rule 6(e) exception. *In re J. Ray McDermott & Co.*, 622 F.2d 166, 171-172 (5th Cir. 1980) (disclosure denied where "a judicial proceeding is only a possibility," and mere desire to investigate not sufficient); *In re Grand Jury Proceedings*, 309 F.2d 440, 443-444 (3d Cir. 1962) (disclosure denied where it was possible that judicial proceeding may not result from investigation); *In re 1978-1980 Grand Jury Proceedings*, 503 F.Supp. 47, 48-49 (N.D. Ohio 1980) (disclosure to IRS for use in civil investigation of tax liability denied because not preliminary to judicial proceedings since lack of assessment of tax deficiency renders commencement of judicial proceeding purely speculative); *In re April 1977 Grand Jury Proceedings*, 506 F.Supp. 1174, 1179 (E.D. Mich. 1981), *appeal pending*, No. 80-1182 (6th Cir.) (disclosure to IRS for civil use in assessment and collection of revenue denied as not preliminary to judicial proceeding since mere abstract right to invoke judicial process not sufficient); *United States v. Young*, 494 F.Supp. 57, 59, 61 (E.D. Tex. 1980) (disclosure denied where materials were to be used to conduct an investigation and mere right of judicial appeal did not meet judicial proceedings requirement of 6(e)); *In re Application of the United States for an Order Pursuant to the Provisions of Rule 6(e), Federal Rules of Criminal Procedure*, 505 F.Supp. 25, 27 (W.D. Pa. 1980) (disclosure to IRS for civil tax audit denied); *Illinois Petition v. Widmar*, 1981 Trade Cases (CCH) Para. 63,771 (N.D. Ill. 1981) (disclosure to State of Illinois denied where test of *Douglas Oil*—materials needed to avoid a possible injustice in another judicial proceeding, 441 U.S. at 222—not met); *In re Disclosure of Evidence*, 650 F.2d 599, 601 (5th Cir. 1981) (disclosure denied where test of *Douglas Oil* not met). Because of the lack of conflict and absence of confusion, further review is unwarranted.

III.

THE QUESTION PRESENTED DOES NOT WARRANT SUPREME COURT REVIEW

The decision in *Baggot* does not unduly impair the ability of IRS to collect taxes and is consistent with congressional intent regarding IRS procedures and Rule 6(e)(3)(C)(i), therefore review is not warranted.

The government's Petition hyperbolizes an implausible policy argument that unless grand jury secrecy is lifted the ability of IRS to collect taxes will be impeded. In light of the thoroughness of the Seventh Circuit's analysis and the manifest correctness of its decision, it is not surprising that the government's Petition focuses on policy arguments designed to grant IRS rights to disclosure that Congress has not provided. The Petition noticeably fails to mention the predominant public policy of grand jury secrecy and the immense power entrusted to IRS to conduct its own civil investigations.

A. The *Baggot* Decision Does Not Impede The Collection Of Taxes.

There is no merit to the government's contention that the Seventh Circuit's opinion will impede the enforcement of federal tax laws (Pet. 22, 28). The court of appeals considered that argument and rejected it (Pet. App. A, 10a-11a) noting that "IRS has other effective statutory means to accomplish its civil purposes" and further noting that "the failure of civil process has not been demonstrated in the record."[10] (Pet. App. A, 10a-11a). Clearly, IRS is not a toothless tiger. It possesses a veritable arsenal of investigative tools for discovering civil tax liabilities. See 26 U.S.C. §§7602-09. Allowing automatic disclosure of grand jury materials to IRS would be contrary to congressional intent in establishing procedures and guidelines for IRS in obtaining information for civil tax audit purposes. See 26 U.S.C. §§7602-09. For example, Congress furnished summons authority to IRS conditioned on numerous safeguards, including the right to the presence of an attorney at all interviews, use of a court reporter, copies of witness statements and the right of intervention when IRS seeks records from a third party recordkeeper. *Id.*, and Fed. Tax Regs. vol. 3 (1982) §601.107(b). To allow automatic and wholesale disclosure of grand jury materials to IRS would dissipate the safeguards and disregard Congressional intent.[11] The court of appeals accurately recognized the request by IRS as an attempt to shortcut its traditional procedures in determining civil tax liabilities, at the expense of emasculating the historic principle of grand jury secrecy, and to convert the grand jury process into a tool for IRS civil discovery.[12]

---

[10] The IRS' failure to employ its independent civil means for investigating Respondent's possible tax liability illustrates its predisposition to litigate this matter as a test case in order to ensure its access to grand jury materials in all grand jury investigations with possible tax implications.

The government does not even give lip service to the principle of grand jury secrecy in its Petition. By opting for disclosure to IRS for practical and policy reasons Petitioner totally discards the fact that grand jury secrecy is "older than our Nation itself. . . ." *Pittsburgh*

---

[11] The Seventh Circuit concluded: "If Congress had intended that grand jury materials could generally be used for the convenience of the government to facilitate its other legitimate purposes, particularly after the grand jury's legitimate criminal function had terminated, it could easily have provided for it." (Pet. App. A, 17a).

[12] It is manifest that grand jury secrecy can not be sacrificed for reasons of expediency or cost. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958); *United States v. Sobotka*, 623 F.2d 764, 768 (2d Cir. 1980).

Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959). The court of appeals' decision does not thwart the collection of taxes, but reflects the historic principle of grand jury secrecy. The court noted that "as important as taxes are, their determination, assessment and collection did not satisfy" the standard for disclosure under Rule 6(e) (Pet. App. A, 10a).

B. The *Baggot* Decision Is Consistent With The Legislative History Of Rule 6(e).

The legislative history of Rule 6(e) does not support the argument that this case is important enough to warrant review. Contrary to the government's Petition, the legislative history does not support the type of disclosure sought here. The legislative history of recent amendments to Rule 6(e) reveals that Congress is acutely aware of the necessity for grand jury secrecy. Rule 6(e) was amended in 1977 primarily to allow disclosure to government personnel to assist federal prosecutors in enforcing federal *criminal* law. The Senate Report on those amendments stated that disclosure of "grand jury information in non-criminal proceedings should be no more restrictive than is the case today under prevailing court decisions." and cited *Procter & Gamble* as the embodiment of that standard.[13] Of course, the standard for

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[13] S. Rep. No. 95-354, 95th Cong., 1st Sess., reprinted in [1977] U.S. Code Cong. & Ad. News pp. 531-32. The Petitioner ignores *Procter & Gamble* on the tenuous theory that that case did not involve disclosure to a federal agency (Pet. 25-26). It is submitted that is a distinction without a difference which has not been accepted by decisional authority.

Instead, the Petition places undue reliance on assorted *dicta* from *Robert Hawthorne, Inc. v. Director of Internal Revenue Service*, 406 F.Supp. 1098 (E.D. Pa. 1976). There, the district court was particularly concerned with technical assistance of

(Footnote continued on following page)

disclosure established in *Procter & Gamble* is "particularized need" which was embraced by the court of appeals. Significantly, the disclosure permitted by the 1977 amendments was limited to assistance necessary in enforcing *federal criminal law* under Rule 6(e)(3)(A)(ii). The amendments further provided that when such disclosure was made, the disclosed materials could not be utilized "for any other purpose" [Rule 6(e)(3)(B)] under pain of contempt. Rule 6(e)2.

It is clear that Congress contemplated strict secrecy: "A government agent receiving grand jury information from an attorney for the government . . . is not free to share such information within the agency which directly employs him, even though it may be useful and relevant to the mission of that agency."[14] It is equally evident

---

[13] *continued*
IRS personnel provided to the United States Attorney in his duty enforcing federal criminal laws. The court required the subpoenaed material to "remain at all times under the aegis of attorneys for the government." 406 F.Supp. at 1113. The court carefully noted that IRS made no civil tax use of any records or information supplied pursuant to the grand jury. *Ibid.* The court expressly noted that the question of misuse of subpoenaed material which an agency obtains indirectly through technical assistance "must await future case development." *Id.*, at 1125. At the very most, *Hawthorne* merely refers to the requirements for disclosure embodied in Rule 6(e)(3)(C)(i). *Id.*, at 1129 n.62.

[14] 123 Cong. Rec. 25193-25196 (1977), remarks of Rep. Charles E. Wiggins; member of House Subcommittee on Criminal Justice, cited with approval in *In Re Perlin*, 589 F.2d 260, 267, n.7 (7th Cir. 1978).

Congressman Wiggins further noted that:

> Grand juries cannot be used for purposes other than the investigation of violations of the criminal law. However, the fact that a civil investigation is ongoing should in no way impede initiating a grand jury investigation. Indeed, an IRS civil audit could well lead to evidence of criminal tax fraud. Both investigations must then go forward. *However, grand jury information must not flow to the civil investigation* although the converse is not necessary or desirable." *Id.* (emphasis supplied).

that Congress contemplated a showing of particularized need prior to civil use of grand jury material by a governmental agency.[15] After three days of hearings the House rejected the original proposed amendment to 6(e) because it would have allowed government agency personnel to use grand jury material in civil cases and "this would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them." Kirkland, *Administrative Agency Access to Grand Jury Material Under Amended Rule 6(e)*, 29 Case Western L. Rev. 295, 314 (1978).

In sum, the legislative history of the 1977 amendments to Rule 6(e) contains repeated and emphatic statements showing the intent of Congress not to change or relax the standards for disclosure of grand jury information for civil purposes. The legislative history does not indicate an intent to give administrative agencies access to grand jury materials for civil purposes as unrestrained as Petitioner seeks here. Congress has not granted any special status to IRS for disclosure and did not modify the burdens required of the government under Rule 6(e)(3)(C)(i) and *Procter & Gamble*. The decision of the court of appeals is manifestly correct and obviously not "absurd" or "anomalous" as Petitioner claims. The court of appeals correctly declined to fashion "a special exception to grand jury secrecy" (Pet. App. A, 19a) for the benefit of IRS. Review of the court's decision is not warranted.

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[15] When questioned by Representative James Mann (S.C.) concerning the likelihood that government agencies would routinely gain access to grand jury materials, Professor Wayne LaFave opined that the right to discovery was not that broad stating:

> The cases that I am familiar with generally have required a strong showing by the administrative agency of a need for the material, *that there is no way they could acquire comparable evidence that it is critical to their undertaking and that is going to be used in connection with a judicial proceeding.* If the administrative agency wants it for purely administrative purposes to use in an administrative hearing, this does not come within the rule.

Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 95th Cong., 1st Sess., on Proposed Amendments to the Federal Rules of Criminal Procedure (1977) (emphasis supplied).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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JAMES E. BAGGOT

May 28, 1982

APPENDIX A

FEDERAL RULE INVOLVED

18 U.S.C. Federal Rule of Criminal Procedure 6(e):

Recording and Disclosure of Proceedings.

* * * * *

(2) General Rule of Secrecy.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

* * * * *

APPENDIX B

INTERNAL REVENUE SERVICE
District
Director

230 S. Dearborn St.
Chicago, Illinois 60604

Person to Contact:
Telephone Number:

Thomas P. Sullivan
U.S. Attorney
219 South Dearborn
15th Floor
Chicago, Illinois 60604

Refer Reply to:
E:JK:bh
Date:
DEC 21 1978

In Re: JAMES BAGGOT
No. 77 CR 564

Dear Mr. Sullivan:

On December 18, 1978, I received the documents submitted by you relative to JAMES BAGGOT. The documents consisted of the information, the minute order and transcript of proceedings before Judge McGARR on June 24, 1977 and the minute order and transcript of proceedings before Judge MARSHALL on September 16, 1977.

A review of the above mentioned documents disclosed only one reference to the Internal Revenue Service. In the transcript of proceedings before Judge MARSHALL, page 12, it was noted that BAGGOT had avoided and possibly evaded his taxes by losing $60,000.00 through noncompetitive trades and three-fourths of the loss was returned to him in currency. The $60,000.00 of losses were deducted by BAGGOT on his 1975 income tax return.

The documents do not contain the names or statements of individuals who returned the cash to BAGGOT, nor do they identify the commodity firms which had prepared the records concerning the fraudulent trades of BAGGOT or if there were any other fraudulent losses or unreported income which could be used to determine the correct tax liability of BAGGOT for 1975.

Therefore, I am requesting that a Rule 6(E) [sic] order for civil purposes be obtained for 1975 due to the following reasons: (1) to obtain the information and documents which would be needed to determine the correct tax liability of BAGGOT for 1975; (2) the names and statements of the witnesses and the documents prepared by the commodity firms in order to substantiate the civil fraud penalty; (3) if a Rule 6(E) [sic] order is not obtained a substantial amount of tax revenue would not be collected; and (4) the statements of the witnesses and the documents would be needed in a judicial proceeding if the taxpayer does not agree to the additional tax being assessed.

The judicial proceeding as mentioned in item four pertains to Tax Court proceedings. When a taxpayer does not agree with Revenue Agent's tax adjustments and after a statutory notice has been issued, the taxpayer will petition the Tax Court for judicial determination. It is our belief that the Internal Revenue Service procedures which provide that every non-agreed case goes to the Tax Court for settlement (unless the taxpayer decides to agree at any stage of the legal proceedings) constitutes a judicial proceeding within the meaning of the Federal Rules of Criminal Procedure and in particular Rule 6(E)(C) [sic]. The point being that if we do not have the necessary information preliminary to the Tax Court docketing, under IRS procedures we cannot go forward with our position to the Tax Court.

In order to prove the tax adjustments based upon fraudulent trades and to sustain the fraud penalty the evidence must be clear and convincing. The evidence in the instant case which would be required is the statements of the witnesses and all pertinent trading records. If the Rule 6(E) [sic] order is not obtained the civil adjustments would be based solely upon the information document and limited court proceedings. These documents would be insufficient to sustain the tax adjustments and fraud penalty in Tax Court proceedings.

Sincerely yours,

JAMES KOPIDLANSKY
Chief, Examination Division

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
JUN 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1938

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES E. BAGGOT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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REPLY MEMORANDUM FOR THE UNITED STATES

Contrary to respondent's contention, as is explained in our petition (page 10 n.6), the court below did not decide whether the Service had demonstrated particularized need justifying disclosure. Rather, because the court decided (Pet. App. 15a-19a) that the requested disclosure would not be directed preliminarily to a judicial proceeding, it had no occasion to decide whether a particularized need had been demonstrated, or whether, as the government argued, a demonstration of particularized need was unnecessary.[1]

---

[1] The question whether the government must make the same "particularized need" showing required of private litigants to obtain disclosure of matters occurring before a grand jury is presented in *United States* v. *Sells Engineering, Inc.*, cert. granted, No. 81-1032 (May 3, 1982). The Court's decision in *Sells* would provide guidance on this issue to the courts below, should its resolution remain necessary following a decision on the issue presented in this case.

Petitioner's contrary assertion (Br. in Opp. 13) rests upon the court of appeals' statement (Pet. App. 10a) that an "extraordinary and compelling need for disclosure in the interest of justice" had not been shown. The court of appeals' remarks, however, were not addressed to the requirements of Rule 6(e) as interpreted in *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211 (1979), but conveyed the court of appeals' disapproval of the district court's resort to its supervisory powers to permit disclosure not authorized by Rule 6(e).

Respondent's attempted distinction (Br. in Opp. 17-19) of *In re Judge Elmo B. Hunter's Special Grand Jury,* 667 F. 2d 724 (8th Cir. 1981), is equally unavailing. The Eighth Circuit's opinion in that case mentioned the district court's finding of "particularized need" only in passing (667 F. 2d at 725 n.2, 728). Particularized need was not an issue before the court of appeals because the sole ground for the district court's denial of disclosure there was that an IRS investigation was not "preliminary to * * * a judicial proceeding." See 667 F. 2d at 724-725. Nor does the court's opinion provide any support for respondent's claim (Br. in Opp. 18 n.8) that the particularized need finding influenced the Eighth Circuit's interpretation of Rule 6(e)(3)(C)(i). In any event, the question whether a disclosure request falls within the scope of Rule 6(e)(3)(C)(i) is entirely distinct from the question whether disclosure should be granted in a particular case within the rule.

In sum, respondent has endeavored to inject into this case an issue that is not presented, but there remains a clear conflict between the circuits on the important question for the administration of the internal revenue laws that is presented by the petition.

For the foregoing reasons and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

JUNE 1982

Petitioner's Brief

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No. 81-1938

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v.

JAMES E. BAGGOT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether disclosure of matters occurring before a grand jury to the Internal Revenue Service for its use in conducting a civil tax investigation to determine liability and assess any tax deficiency constitutes disclosure directed "preliminarily to * * * a judicial proceeding" that may be authorized pursuant to Federal Rule of Criminal Procedure 6(e)(3)(C)(i) upon application to the court supervising the grand jury.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Rule involved 2

Statement 3

Summary of argument 9

Argument:

Disclosure of matters occurring before a grand jury to the Internal Revenue Service for its use in conducting a civil tax investigation to determine liability and assert any tax deficiency constitutes disclosure directed "preliminarily to * * * a judicial proceeding" that may be authorized pursuant to Federal Rule of Criminal Procedure 6(e) (3) (C) (i) by the court supervising the grand jury 13

- A. The holding of the court of appeals is based upon an unreasonably narrow and restrictive interpretation of the plain language of the Rule 16
- B. Other courts of appeals have properly interpreted the Rule as permitting disclosure in circumstances similar to the ones here, in light of the nature of civil tax investigations 18
- C. The legislative history of Rule 6(e) reveals that congress intended Rule 6(e) (3) (C) (i) to permit disclosure of matters occurring before the grand jury for use in assessing and collecting civil tax liabilities 27
- D. Public policy considerations support reading Rule 6(e) (3) (C) (i) to permit a court order directing disclosure of grand jury materials to the IRS for a civil tax investigation 31

Conclusion 37

Appendix 1a

TABLE OF AUTHORITIES

Cases: Page

April 1977 Grand Jury Proceedings, In re, 506 F. Supp. 1174, appeal pending, No. 81-1182 (6th Cir.) 19
Bradley v. *Fairfax,* 634 F.2d 1126 20, 21
December 1974 Term Grand Jury Investigation, In re, 449 F. Supp. 743 18, 19, 35
Disclosure of Testimony Before The Grand Jury (Troia), In re, 580 F.2d 281 19, 26, 33
Doe v. *Rosenberry,* 255 F.2d 118 14, 19
Douglas Oil Co. v. *Petrol Stops Northwest,* 441 U.S. 211 13, 14, 18, 31, 33
FAA Administrator v. *Robertson,* 422 U.S. 255 28
G.M. Leasing Corp. v. *United States,* 429 U.S. 338 22
Grand Jury for the Northern District of Alabama (Drummond Coal Co.), In re, No. 81-7076 (5th Cir. July 20, 1981) 19
Grand Jury Investigation of Uranium Industry, In re, [1979-2] Trade Cas. ¶ 62,798 20
Grand Jury Miscellaneous No. 979 (Northern District of Texas, In re, 583 F.2d 128 18
Grand Jury Proceedings, In re, 309 F.2d 440 20, 21
Grand Jury Subpoenas, April, 1978, at Baltimore, In re, 581 F.2d 1103, cert. denied *sub nom. Fairchild Industries, Inc.* v. *Harvey,* 440 U.S. 971 18, 19
J. Ray McDermott & Co., In re, 622 F.2d 166 20, 21
Judge Elmo B. Hunter's Special Grand Jury, In re, 667 F.2d 724 18-19, 21
July 1973 Grand Jury, In re, 374 F. Supp. 1334 35
Laing v. *United States,* 423 U.S. 161 23
1978-1980 Grand Jury Proceedings, In re, 503 F. Supp. 47 19
Red Lion Broadcasting Co. v. *FCC,* 395 U.S. 367 28
Robert Hawthorne, Inc. v. *Director of Internal Revenue,* 406 F. Supp. 1098 11, 29, 30, 35
Seymour v. *Superintendent,* 368 U.S. 351 28
Special February 1971 Grand Jury, In re v. *Conlisk,* 490 F.2d 894 19, 26, 33
State of Illinois v. *Abbott & Associates, Inc.,* cert. granted, No. 81-1114 (Mar. 22, 1982) 14

Cases—Continued Page

United States v. *Bates*, 627 F.2d 349 20
United States v. *Bisceglia*, 420 U.S. 141 36
United States v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52 9
United States v. *Kordel*, 397 U.S. 1 30
United States v. *LaSalle National Bank*, 437 U.S. 298 36
United States v. *Procter & Gamble Co.*, 356 U.S. 677 ..... 14, 29, 31, 35
United States v. *Rose*, 215 F.2d 617 31
United States v. *Rutherford*, 442 U.S. 544 28
United States v. *Sobotka*, 632 F.2d 764 19
United States v. *Sells Engineering, Inc.*, cert. granted, No. 81-1032 (May 3, 1982) 9, 14, 15, 18, 27, 32, 34, 36
United States v. *Stanford*, 589 F.2d 285, cert. denied, 440 U.S. 983 9
William H. Pflaumer & Sons, Inc., In re, 53 F.R.D. 464 35

Constitution, statutes and rule:

United States Constitution, Article I 25
Clayton Act, Section 4F(b), 15 U.S.C. 15f(b) 14
Commodity Exchange Act, 7 U.S.C. 6c(a)(A) 4, 14, 15
Federal Trade Commission Act, Section 5(*l*), 15 U.S.C. 45(*l*) 21
Internal Revenue Code of 1954 (26 U.S.C.):
  Section 6103 33
  Section 6201 22
  Section 6212 ..... 23, 24
  Section 6213 ..... 23, 24
  Section 6321 22
  Section 6331 22
  Section 6851 23
  Section 6861 23
  Section 7441-7487 25
  Section 7601 22
  Section 7602 22
  Section 7801 33

Constitution, statutes and rule—Continued	Page
Revenue Act of 1921, ch. 136, Section 250(d), 42 Stat. 265-266	24
Revenue Act of 1924, ch. 234, 43 Stat. 253 *et seq.*:	
Section 274(c), 43 Stat. 297	24
Section 274(d), 43 Stat. 297	24
Revenue Act of 1942, ch. 619, 56 Stat. 798 *et seq.*:	
Section 504(a), 56 Stat. 957	24
Section 504(b), 56 Stat. 957	24
Shipping Act, Section 15, 46 U.S.C. 814	21
Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 730-736	25
15 U.S.C. 717r	21
15 U.S.C. 717s	21
Fed. R. Crim. P.:	
Rule 6	27
Rule 6(e)	*passim*
Rule 6(e)(2)	8, 14
Rule 6(e)(3)(A)(i)	14, 15
Rule 6(e)(3)(A)(ii)	14, 27
Rule 6(e)(3)(B)	27
Rule 6(e)(3)(C)(i)	*passim*
Rule 6(e)(3)(C)(ii)	14
Miscellaneous:	
123 Cong. Rec. (1977):	
pp. 25193-25196	11
pp. 25195-25196	30
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1938

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES E. BAGGOT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion and supplemental opinion of the court of appeals (Pet. App. 1a-32a) are reported at 662 F.2d 1232. The memorandum opinion and order of the district court (Pet. App. 33a-48a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 49a-50a) was entered on June 25, 1981, and a petition for rehearing was denied on November 20, 1981 (Pet. App. 27a-28a). On February 10, 1982, Justice Stevens extended the time in which to file a petition for a writ of certiorari until April 19, 1982. The petition for a writ of certiorari was filed on that date and was granted on June 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 6(e) provides in pertinent part:

> *Recording and Disclosure of Proceedings.*
>
> * * * * *
>
> (2) *General Rule of Secrecy.*—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.
>
> (3) *Exceptions.*
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of

> such attorney's duty to enforce federal criminal law.
>
> * * * * *
>
> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or
>
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.
>
> If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT

In May 1976, a special grand jury convened in the Northern District of Illinois began investigating certain commodity futures trading transactions on the Chicago Board of Trade and related criminal violations of the Commodities Exchange Act and Internal Revenue Code. Respondent James E. Baggot eventually became a target of the investigation. He was interviewed by two Internal Revenue Service agents, acting as agents of the grand jury, at his home and then subpoenaed to appear before the grand jury. When he responded to the subpoena, he consented to being interviewed by Assistant United States Attorney Scott Lassar and another Assistant United States Attorney in lieu of appearing before the grand jury. During that interview and two subsequent meetings, respondent entered into an agreement to plead guilty to an information charging two misdemeanor violations of the Commodity Exchange Act, 7 U.S.C. 6c(a)(A). Consistent with the plea agreement, respondent eventually appeared before the grand jury and read a statement that had been prepared by an Assistant United States Attorney on the basis of respondent's previous disclosures. Thereafter, on June 24, 1977, respondent pleaded guilty to the information as agreed (Pet. App. 1a-2a, 5a-6a, 33a-34a).[1]

On March 6, 1978, the United States Attorney filed a motion with the United States District Court for the Northern District of Illinois requesting the court to issue an order permitting disclosure of grand jury transcripts and documents that had been subpoenaed by the grand jury to the Internal Revenue Service ("the Service") for its use in determining respondent's income tax liabilities.

The motion asserted, *inter alia*, that the materials involved "matters occurring before the grand jury" subject to disclosure "when so directed by a court preliminarily to or in connection with a judicial proceeding" (Fed. R. Crim. P. 6(e)(3)(C)(i)). The district court denied the government's motion without prejudice on two grounds. First, the court determined that the government had failed to establish with the requisite particularity the Service's need for these materials. Second, the court held that there was no showing that the proposed disclosure would be preliminary to any judicial proceeding within the meaning of Fed. R. Crim. P. 6(e)(3)(C)(i).

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[1] The transcript of the plea and sentencing proceedings show that respondent participated in rigged commodity trades that produced substantial paper losses, which he deducted in preparing his tax returns. He recovered most of these "losses" from his trading partners in cash kickbacks, which were not reported to the Internal Revenue Service (Plea Tr. 4; Sentencing Tr. 11).

After reviewing the information charging respondent with violations of the Commodity Exchange Act and the transcript of his plea and sentencing proceedings,[2] the Chief of the Examination Division of the IRS informed the United States Attorney that these documents indicated that respondent had probably evaded his tax obligations, but that additional information would be needed to determine the amount due and to build a case against respondent (Brief in Opp. App. 3a-4a). Specifically, the Chief of the Examination Division sought information that would identify those who made unreported cash payments to respondent and the commodity trading firms involved. Assuming that this information had been revealed to the grand jury, the Chief of the Examination Division requested that the United States Attorney seek any order necessary under Fed. R. Crim. P. 6(e) to authorize release of grand jury materials containing the information (*ibid.*). He explained that, because any dispute over the assessment of taxes due would require resolution in Tax Court proceedings initiated by respondent, the requested disclosure would be directed "preliminarily to * * * a judicial proceeding," and therefore could be directed by the court pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i).

On February 27, 1979, the United States Attorney again sought the district court's leave to release the requested information,[3] reiterating the contention that disclosure should be authorized pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i), as antecedent to a judicial proceeding (Pet. App. 37a). This time the district court granted the disclosure motion.

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[2] The district court on December 6, 1978, authorized the United States Attorney to disclose these records to the Service; they were, of course, already in the public record.

[3] The United States Attorney sought leave to disclose: respondent's prepared statement, Assistant United States At-

First, the court concluded that respondent's prepared statement (though not the transcript of its delivery to the grand jury) as well as Assistant United States Attorney Lassar's memorandum summarizing the initial interview reflected government investigation independent of the grand jury. The court accordingly held that these two documents were not matters occurring before the grand jury, and could be disclosed to the Service without a court order.[4]

The district court concluded that the balance of the materials sought by the Service were covered by the rule of grand jury secrecy and could not be released on the authority of Rule 6(e)(3)(C)(i) (Pet. App. 37a-47a). The court labeled the Service's contemplated use of the grand jury materials "simply administrative" (Pet. App. 46a-47a), because no judicial proceeding could arise until the Service made a

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torney Lassar's memorandum summarizing the initial interview with respondent, a letter to respondent from the Pacific Trading Company showing respondent's net profit for 1975, records of all 1975 commodity transactions for the accounts of three other individuals with a second commodity trading firm, transcripts of the grand jury testimony of four individuals (including those whose commodity accounts records were subpoenaed), and a report prepared at the close of the grand jury investigation by an IRS special agent, detailed to assist the grand jury in its probe of respondent, that summarized the investigation and the evidence (Pet. App. 6a, 36a).

[4] When the United States Attorney first proposed this view of the two documents, the court had rejected it (Pet. App. 35a).

deficiency determination that was contested by respondent in the Tax Court. The district court nevertheless granted the disclosure, relying on its general supervisory power over the grand jury (Pet. App. 47a). Suggesting that exercise of this supervisory power was necessary to relieve the United States Attorney of permanent responsibility for custody of the grand jury materials (Pet. App. 47a-48a), the court concluded that disclosure to the Service would be the "only useful disposition" of these materials (Pet. App. 48a).

Respondent appealed. A stay of disclosure was granted during the pendency of the appeal. Respondent argued that all of the items at issue were subject to grand jury secrecy constraints; that disclosure to the Service was not disclosure directed "preliminarily to * * * a judicial proceeding"; that the government had, in any event, failed to show a particularized need justifying disclosure; and that the district court's resort to supervisory powers was improper. As appellee, the government argued: (1) that none of the items in issue, except for the transcripts of grand jury testimony and portions of the Special Agent's Report based thereon, were "matters occurring before the grand jury"; (2) that disclosure should have been authorized under Fed. R. Crim. P. 6(e)(3)(C)(i); (3) that the "particularized need" standard is inapplicable when the government seeks disclosure of grand jury materials; and (4) that the district court properly exercised its supervisory power because, with the criminal proceeding closed, there was little further need for grand jury secrecy (Pet. App. 7a-8a).

A divided court of appeals reversed. Initially, the court rejected the district court's resort to extra-statutory supervisory powers (Pet. App. 9a-12a).[5] The court acknowledged that there may be situations in which the need for disclosure in the interests of justice overcomes the policy of grand jury secrecy, justifying relaxation of the strictures of Rule 6(e). The court concluded, however, that, at least on the record of this case, the Service's responsibility for determination of tax liabilities and collection of taxes does not meet that standard. The court of appeals also concluded that the rule of secrecy embodied in Fed. R. Crim. P. 6(e)(2) is applicable to essentially all of the materials in issue, including respondent's prepared statement and the Lassar memorandum (Pet. App. 12a-15a).[6]

Finally, the court of appeals agreed (Pet. App. 15a-19a) with the district court that disclosure of grand jury material to the Service for a tax investigation would not be disclosure directed "preliminarily to * * * a judicial proceeding" and accordingly could not be authorized under Fed. R. Crim. P. 6(e)(3)(C)(i). The court of appeals stated (Pet. App. 16a) that "the present Internal Revenue Service civil investigation of Baggot's possible additional tax liabilities is too embryonic, speculative, and uncertain to firmly say that it is 'preliminarily to' a judicial proceeding." [7]

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[5] Judge Pell, who dissented from the judgment in substantial part (Pet. App. 20a-26a), concurred in this aspect of the majority opinion (Pet. App. 20a). Our petition for certiorari did not seek review of this issue (Pet. 14 n.8).

[6] Although the majority made no specific mention of the statement reflecting commodity transactions or the letter to respondent (see note 3, *supra*), which the government had argued were not matters occurring before the grand jury at all, these were clearly covered by its ruling. The court of appeals did hold (Pet. App. 15a) that any portions of the special agent's summary report that rested on sources outside the grand jury investigation might be disclosed.

In dissent, Judge Pell rejected the majority's premise that judicial proceedings must be a virtual certainty before disclosure may be secured under the Rule.[8] But even applying that standard, he concluded that disclosure to the Service was authorized under the facts of this case (Pet. App. 21a-22a).

SUMMARY OF ARGUMENT

Rule 6(e) of the Federal Rules of Criminal Procedure codifies the traditional rule that grand jury proceedings should be kept secret. The rule prohibits disclosure of "matters occurring before the grand jury" by anyone (other than a witness) having access to the grand jury proceedings. The rule permits disclosure of "matters occurring before the grand jury," *inter alia*, "when so directed by a court preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i). The court of appeals held that grand jury material may not be released to the Internal Revenue Service for a civil tax investigation pursuant to Rule 6(e)(3)(C)(i) on the ground that such activity is not "preliminar[]y to" a judicial proceeding.

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[7] Because of this disposition, the court of appeals did not address the standard to be applied to government disclosure requests under Rule 6(e)(3)(C)(i). That question is presented in *United States* v. *Sells Engineering, Inc.*, cert. granted, No. 81-1032 (May 3, 1982).

[8] Judge Pell also dissented on the independent ground that, under *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960), and the Seventh Circuit's own decision in *United States* v. *Stanford*, 589 F.2d 285 (1978), cert. denied, 440 U.S. 983 (1979), the Lassar memorandum and the commodity trading company records showing fraudulent transactions were not matters occurring before the grand jury subject to grand jury secrecy constraints (Pet. App. 20a, 22a-25a).

In denying the government's petition for rehearing, both the panel majority and Judge Pell issued supplemental opinions addressing the *Interstate Dress Carriers* issue. Our petition for certiorari did not seek review of this issue (Pet. 14 n.8).

The holding of the court of appeals, that disclosure may be directed as "preliminarily to * * * a judicial proceeding" only when it can be said with virtual certainty that a judicial proceeding will occur, is based upon an unreasonably restrictive interpretation of the rule which renders the "preliminarily to" branch of the rule little more than surplusage. Although the Service has yet to assert a deficiency against the respondent and the option to initiate litigation with respect to any deficiency ultimately determined rests with respondent, these facts do not distinguish this investigation from other situations in which disclosure has been authorized "preliminarily to" a judicial proceeding. The courts of appeals have generally approved the disclosure of grand jury materials for use in administrative activities that are designed to culminate in a judicial proceeding.

The statutory scheme designed by Congress for the ascertainment, assessment and collection of taxes is designed to culminate in judicial proceedings whenever necessary to resolve civil tax disputes. The Internal Revenue Code does not permit the Service to make binding determinations of outstanding tax liabilities. Instead, the Code provides that the taxpayer be notified when the Service determines a deficiency in tax. If the taxpayer does not agree with the Service's determination, he may obtain immediate *de novo* review in the United States Tax Court, or he may first pay the tax and then sue the United States for a refund in either a United States district court or the Court of Claims.

The legislative history of the 1977 amendments to Rule 6(e) indicated that Congress contemplated that the use of grand jury material at issue here be allowed. The Senate Report on the Amendment, S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977), cited as an example of permissible civil law enforcement use of grand jury materials *Robert Hawthorne, Inc.* v. *Director of Internal Revenue*, 406 F. Supp. 1098 (E. D. Pa. 1976), in which the court expressly recognized that the Internal Revenue Service ultimately may obtain disclosure of grand jury material through a court order under Rule 6(e). In explanatory remarks on the floor of the House, Congressman Wiggins of the House Judiciary Committee (after noting the relevance of grand jury materials to civil tax investigations) specifically stated that, at the conclusion of the grand jury investigation, evidence indicating violations of civil statutes should be turned over to the "appropriate governmental agency." 123 Cong. Rec. 25193-25196 (1977).

Public policy considerations support the government's position. The interest in secrecy that Rule 6(e) is designed to protect is no more compromised by disclosure of grand jury materials to the Internal Revenue Service than it is in any other situation in which disclosure has been approved as preliminary to a judicial proceeding, and the uses to which the Internal Revenue Service puts such materials are no more remote from judicial proceedings than those found to fall within the "preliminarily to" branch of the rule in other cases.

The court of appeals' restrictive reading of Rule 6(e)(3)(C)(i) has substantial potential for impeding the enforcement of federal tax laws and grand jury investigations of financial crimes. Internal Revenue Service agent participation in grand jury investigations of financial crimes has been an effective way of performing the Service's dual criminal and civil law enforcement responsibilities, and the agents' expertise in analyzing financial transactions has been an invaluable investigative tool for the attorneys for the goverment conducting those investigations. Devotion of limited manpower to assist in grand jury investigations must be restricted unless civil tax enforcement objectives can continue to be achieved in addition to the criminal enforcement objectives. Accordingly, it is important to maintain the availability of orders under Rule 6(e) permitting disclosure of matters occurring before the grand jury to the Internal Revenue Service for civil tax determination after agents of the Service have assisted the attorney for the government in the grand jury investigation. If the fruits of the investigation and the knowledge gained by the agents during the investigation cannot be utilized for civil tax determination purposes, a choice must be made between those dual objectives. Duplication of lengthy investigations can rarely be justified; in most cases the limited resources of the Internal Revenue Service could not be committed to assist grand jury investigations unless the rendering of such assistance can provide information for use in determining tax liabilities as well as providing evidence of criminal conduct.

ARGUMENT

DISCLOSURE OF MATTERS OCCURRING BEFORE A GRAND JURY TO THE INTERNAL REVENUE SERVICE FOR ITS USE IN CONDUCTING A CIVIL TAX INVESTIGATION TO DETERMINE LIABILITY AND ASSERT ANY TAX DEFICIENCY CONSTITUTES DISCLOSURE DIRECTED "PRELIMINARILY TO * * * A JUDICIAL PROCEEDING" THAT MAY BE AUTHORIZED PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 6(e)(3)(C)(i) BY THE COURT SUPERVISING THE GRAND JURY

It has long been accepted "that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). In 1946, this traditional rule of grand jury secrecy was codified as part of the Federal Rules of Criminal Procedure in Rule 6(e).[9]

In its present form, the rule prohibits disclosure of "matters occurring before the grand jury" by anyone (other than a witness) having access to the grand jury proceedings, including grand jurors, transcribers and reporters, attorneys for the government and agents of the grand jury. Fed. R. Crim. P. 6(e)(2). The Rule permits disclosure of "matters occurring before the grand jury," *inter alia*, "when so directed by a court preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i).[10] That "judicial proceeding" may be a civil one. *Doe* v. *Rosenberry*, 255 F.2d 118 (2d Cir. 1958). Cf. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958); *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, 441 U.S. at 219-224.

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[9] Rule 6(e) as originally promulgated provided:

> *Secrecy of Proceedings and Disclosure*: Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. * * *

This case presents the important question whether disclosure of grand jury materials may be made pursuant to the Rule to the Internal Revenue Service for its use in determining tax liability and asserting any deficiency that may be owed.[11] Respondent's conviction for misdemeanor violations of the Commodity Exchange Act, 7 U.S.C. 6c(a)(A), was obtained, in part, from information developed by a grand jury investigation into criminal violations of the Commodity Exchange Act and the Internal Revenue Code. That information suggested understatements of income in respondent's federal income tax returns for two years, and the attorneys for the government who had conducted the grand jury investigation sought, by repeated applications under Rule 6(e)(3)(C)(i) to the district court which supervised the grand jury, to obtain permission to disclose that information to the Internal Revenue Service for its use in determining respondent's tax liability and asserting any deficiency found to be due. A majority of the court of appeals held that such disclosure was not permissible under that provision of Rule 6(e)(3)(C)(i) authorizing a court to direct disclosure of matters occurring before a grand jury "preliminarily to * * * a judicial proceeding." The majority's decision reversed a longstanding administrative interpretation of Rule 6(e) by both the Department of Justice and the Internal Revenue Service and substituted a restrictive and narrow interpretation of the Rule that is not warranted by either the plain language of the Rule, prior case law, or legislative history. Moreover, considerations of public policy do not justify the resultant hampering of the Internal Revenue Service's ability to collect the information necessary to carry out its

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[10] The Rule also permits disclosure without a court order to an attorney for the government for use in the performance of his duties (Rule 6(e)(3)(A)(i)) and to such government personnel as are deemed necessary by an attorney for the government to assist him in the performance of his duties to enforce federal criminal law (Rule 6(e)(3)(A)(ii)). Disclosure may also be made under the Rule when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury (Rule 6(e)(3)(C)(ii).

[11] Two other cases pending before the Court present significant issues pertaining to grand jury secrecy. *State of Illinois* v. *Abbott & Associates, Inc.*, cert. granted, No. 81-1114 (Mar. 22, 1982), presents, *inter alia*, the question whether Section 4F(b) of the Clayton Act, 15 U.S.C. 15f(b), authorizes disclosure to state attorneys general of grand jury materials relating to antitrust investigations pursuant to Rule 6(e)(3)(C)(i) on less than a showing of particularized and compelling need. *United States* v. *Sells Engineering, Inc.*, cert. granted, No. 81-1032 (May 3, 1982), presents the ques-

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tion whether Rule 6(e)(3)(A)(i) authorizes disclosure of grand jury materials—without a court order—to Justice Department attorneys engaged in evaluating or preparing civil False Claims Act litigation. *Sells* also presents the question whether disclosure to government personnel as to whom leave of court is required must rest upon a showing of particularized and compelling need.

statutorily-mandated duty to determine, assess and collect taxes.

A. The holding of the court of appeals is based upon an unreasonably narrow and restrictive interpretation of the plain language of the Rule

Both Judge Pell in dissent (Pet. App. 21a) and the panel majority (Pet. App. 15a-16a) read the language of the Rule permitting a court to direct disclosure of grand jury materials "in connection with a judicial proceeding" as covering the situation in which the judicial proceeding has already been commenced, and the direction to disclose "preliminarily to" a judicial proceeding as referring to proceedings that are not yet in existence. Judge Pell and the majority differed, however, in the degree of predictability that the latter provision requires. The majority found "the possibility that [no judicial proceeding] may result" sufficient to render the provision inapplicable (Pet. App. 16a), while Judge Pell would have read the Rule as permitting the court to order disclosure whenever the investigation is intended to lead to the judicial proceeding (Pet. App. 21a).

We do not suggest either that the Rule contains *no* probability requirement—*i.e.*, that the mere speculative possibility that a judicial proceeding might result from the disclosure of grand jury materials would be sufficient to permit the court to direct the disclosure—or that this Court should attempt in this case to define precisely the degree of probability required as a statutory minimum. We submit only that Rule 6(e) cannot reasonably be read to preclude disclosure whenever there is a possibility that the anticipated judicial proceeding will not occur, and that where, as here, the governing statute clearly contemplates judicial resolution of any disputes growing out of the investigation, disclosure is permitted.

If the disclosure of grand jury materials may be made only when judicial proceedings that have not yet been initiated are certain to occur, the "preliminarily to" language of the Rule would have no practical effect. There are always contingencies—both foreseeable and unforeseeable—that may intervene to avert litigation; as Judge Pell observed, "the actual beginning of litigation is always an uncertain matter" (Pet. App. 21a). Although the majority apparently found it significant that the investigation might result in a finding of no deficiency, or that the taxpayer might elect to pay any asserted deficiency without litigation (Pet. App. 15a), similar possibilities will always be present when grand jury materials are sought in connection with any civil proceeding: further investigation may exonerate the subject, or he may agree to settle the case without litigation. If disclosure could be obtained only at the point when a judicial proceeding is inevitable, the provision permitting disclosure "in connection with a judicial proceeding" would seem to be applicable. The "preliminarily to" language, unless it is mere surplusage, apparently contemplates disclosure at an earlier stage, when the judicial proceeding is less certain to occur.

The court of appeals' restrictive reading of the "preliminarily to" branch of the Rule was apparently motivated, at least in part, by fear that a more expansive interpretation could lead to "wholesale subsequent disclosure [of grand jury materials which] might discourage free and untrammeled disclosures [before grand juries] by persons having information with respect to the commission of crimes" and that "[a] liberal disclosure policy in tax cases * * * would also create a temptation to abuse the grand jury process" (Pet. App. 11a-12a). But such fears are adequately dealt with by the requirement that a party requesting disclosure under Rule 6(e)(3)(C)(i) must establish that its need for the information outweighs the public interest in continued grand jury secrecy. See *Douglas Oil Co.* v. *Petrol Stops Northwest, supra*, 441 U.S. at 223. This requirement eliminates the possibility that a broader reading of the phrase "preliminarily to" than that adopted by the court below will result in "free and untrammeled disclosure." Nor will release of grand jury materials to the Internal Revenue Service upon an appropriate showing encourage grand jury abuse, for the government will still be required to show that the grand jury has been utilized in good faith and not simply to gather information for civil purposes. *In re December 1974 Term Grand Jury Investigation*, 449 F. Supp. 743 (D. Md. 1978). See also *In re Grand Jury, Miscellaneous No. 979 (Northern District of Texas)*, 583 F.2d 128, 131 n.2 (5th Cir. 1978); *In re Grand Jury Subpoenas, April, 1978, at Baltimore*, 581 F.2d 1103, 1109-1110 (4th Cir. 1978), cert. denied *sub nom. Fairchild Industries, Inc.* v. *Harvey*, 440 U.S. 971 (1979).[12]

B. Other courts of appeals have properly interpreted the Rule as permitting disclosure in circumstances similar to the ones here, in light of the nature of civil tax investigations

The Eighth Circuit has concluded that Rule 6(e)(3)(C)(i) permits the disclosure of grand jury materials for use in conducting civil tax investigations. *In re Judge Elmo B. Hunter's Special Grand*

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[12] The nature of the showing the government should be required to make is discussed in our brief (at 41-47) in *United States* v. *Sells Engineering, Inc.*, No. 81-1032, 1982 Term.

Jury, 667 F.2d 724 (1981) (following Judge Pell's dissent in the instant case). See also *In re Grand Jury Subpoenas, April, 1978, at Baltimore, supra*, (citing with approval *In re December 1974 Term Grand Jury Investigation*, 449 F. Supp. 743 (D. Md. 1978)).[13] As the court observed in *In re Judge Elmo B. Hunter's Special Grand Jury, supra*, 667 F.2d at 728, the courts of appeals have repeatedly approved the disclosure of grand jury materials for use in a variety of investigatory proceedings under the "preliminarily to" branch of Rule 6(e)(3)(C)(i) on the theory that the investigation "is designed to culminate in, or clearly contemplates, a judicial proceeding."[14] As the Eighth Circuit noted (*ibid.*):

> In none of these cases [where disclosure was authorized] can it be said with any certainty that a judicial proceeding will occur. The investigating authority may conclude there has been no

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[13] Two district courts within the Sixth Circuit have agreed with the decision below. *In re April 1977 Grand Jury Proceedings*, 506 F. Supp. 1174 (E.D. Mich. 1981), appeal pending, No. 81-1182 (6th Cir.); *In re 1978-1980 Grand Jury Proceedings*, 503 F. Supp. 47 (N.D. Ohio 1980). In an unpublished decision, the Fifth Circuit has summarily affirmed a sealed district court order that barred release of grand jury material sought by the IRS for use in a civil tax investigation. *In re Grand Jury for the Northern District of Alabama (Drummond Coal Co.)*, No. 81-7076 (July 20, 1981).

[14] See, *e.g.*, *United States* v. *Sobotka*, 623 F.2d 764, 766 (2d Cir. 1980) (attorney disciplinary proceeding); *In re Disclosure of Testimony Before the Grand Jury (Troia)*, 580 F.2d 281, 285-286 (8th Cir. 1978) (same); *Doe* v. *Rosenberry*, 255 F.2d 118, 119-120 (2d Cir. 1958) (same); *In re Special February 1971 Grand Jury* v. *Conlisk*, 490 F.2d 894, 896-897 (7th Cir. 1973) (police board of inquiry).

> wrongdoing, or the subject of the investigation may not contest the adverse action. * * * [T]here is no substantial difference from the IRS civil tax assessment situation.

The panel majority here relied instead on a line of cases refusing to permit disclosure sought for use in investigations leading to administrative adjudications. See *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962); *United States* v. *Bates*, 627 F.2d 349 (D.C. Cir. 1980); *In re J. Ray McDermott & Co.*, 622 F.2d 166 (5th Cir. 1980); *Bradley* v. *Fairfax*, 634 F.2d 1126 (8th Cir. 1980).[15]

In those cases, the agency investigatory proceeding for which the grand jury materials were sought led to an administrative order or adjudication following an administrative hearing. The agency proceeding was thus complete in itself, and the statutes conferring administrative adjudicative authority did not contemplate that any other proceeding would follow that action (other than the possibility of limited judicial review, on the administrative record, by a court of appeals).[16] There was no right to a trial *de novo* in a court.

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[15] The court of appeals also relied upon *In re Grand Jury Investigation of Uranium Industry*, [1979-2] Trade Cas. ¶ 62,798 (D.D.C. 1979) ("Uranium Industry"), where disclosure was sought by a congressional committee for investigatory purposes. The court specifically distinguished disclosure to IRS for civil tax investigations, [1979-2] Trade Cas. ¶ 62,798, at 78,643, stating only that disclosure was to be denied where "the likelihood of a court's involvement is either highly remote or non-existent." That case is thus entirely consistent with our position here. See pages 16-17, *supra*.

[16] In *United States* v. *Bates*, *supra*, the Federal Maritime Commission sought access to grand jury proceedings relating to violations of the Sherman Act in ocean shipping in the

Analogizing tax investigations to these types of administrative procedures, rather than to the investigatory proceedings relied upon by the Eighth Circuit in *In re Judge Elmo B. Hunter's Special Grand Jury, supra,* reflects a fundamental misunderstanding of procedures under the Internal Revenue Code. As the Eighth Circuit recognized, the statutory scheme designed by Congress for the ascertainment, assessment and collection of taxes contemplates that disputes re-

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North Atlantic, for use in an administrative proceeding to determine whether the practices violated Section 15 of the Shipping Act, 46 U.S.C. 814. Similarly, in *In re Grand Jury Proceedings, supra,* the Federal Trade Commission sought access to grand jury proceedings relating to Sherman Act violations for use in agency proceedings pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*). *In re J. Ray McDermott & Co., supra,* also involved an attempt to obtain grand jury materials relating to Sherman Act violations. There, the Federal Energy Regulatory Commission (FERC) sought the material to determine whether possible overcharges resulting from Sherman Act violations had been improperly included in the rates charged by pipelines subject to Commission regulation. The court rejected FERC's contentions that the requested disclosure was preliminary to court of appeals' review of an administrative determination by FERC (pursuant to 15 U.S.C. 717r) or a district court enforcement action initiated by FERC (pursuant to 15 U.S.C. 717s). The court found the nexus between the administrative proceeding and the judicial proceedings too attenuated to permit disclosure. 622 F.2d at 171.

Finally, *Bradley* v. *Fairfax, supra,* involved the disclosure of grand jury material to the United States Parole Commission. Although the court suggested that judicial review of parole commission determinations is too limited and independent of the agency proceeding to justify disclosure pursuant to Rule 6(e) (3) (C) (i), it found the disclosure to be harmless error.

garding taxpayers' tax liabilities will be resolved by courts of the United States. Indeed, the Internal Revenue Code of 1954 (26 U.S.C.) provides no mechanism for final agency resolution of disputed tax liabilities in a manner binding on a taxpayer who disagrees with the Service's determination that there is a tax deficiency. Since the investigations of the Internal Revenue Service to determine tax liability do not lead to any agency adjudication, the determination of taxes is plainly distinguishable from agency investigations that lead to binding agency adjudications.

Section 6201 of the Internal Revenue Code authorizes the Secretary of the Treasury "to make the inquiries, determinations, and assessments of all taxes" imposed by the Code, and Sections 7601 and 7602 direct the Internal Revenue Service to conduct inquiries and investigations to determine tax liabilities and to ascertain the correctness of tax returns through the examination of any data that may be relevant to such examinations. Once an assessment of additional taxes is made, collection may be undertaken, after notice and demand for payment, by levy and distraint. See Sections 6321 and 6331; see *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 349-350 (1977). After assessment and collection of a tax, a taxpayer who was unable to convince the Internal Revenue Service that the assessment was erroneous has no administrative remedies, but must file suit for a refund of the taxes, in a district court or the United States Court of Claims. In a refund suit the dispute over the tax liability is fully determinable, *de novo*, by the district court or the Court of Claims.

Moreover, the Internal Revenue Code does not normally permit assessment of taxes determined to be due and owing until after the taxpayer has been notified of the determination that a deficiency in his taxes exists and has been given an opportunity to petition the United States Tax Court for a redetermination of that deficiency. The Code (Section 6212) requires the Internal Revenue Service to determine the amount of the taxpayer's deficiency and notify him, by certified or registered mail, of that deficiency. Section 6213 of the Code then provides the taxpayer 90 days from the date the notice is mailed to file a petition with the United States Tax Court for a redetermination of the deficiency.[17]

In short, the Internal Revenue Code confers no authority on the Secretary of the Treasury or the Internal Revenue Service to make binding determinations regarding the amounts of federal tax liabilities due and owing. Rather, it requires the Secretary to make his determination, and notify the taxpayer of it. If the taxpayer disagrees, he may obtain immediate *de novo* review of the Secretary's unilateral determination in either the United States Tax Court, or (by first paying the tax and then suing the United States for a refund of the taxes paid) in a district court or the Court of Claims.

This special statutory procedure requiring resort to the courts, rather than binding administrative procedures for the resolution of tax disputes, is the result of specific congressional choices, as the history of the Tax Court demonstrates. The deficiency procedure now contained in Sections 6212 and 6213 of the Code has been part of the internal revenue laws in some form since 1921. Section 250(d) of the Revenue Act of 1921, ch. 136, 42 Stat. 265-266, provided that a taxpayer notified that a deficiency had been determined against him was to be given thirty days "in which to file an appeal [with the agency]." The Senate Report accompanying the Act (S. Rep. No. 275, 67th Cong., 1st Sess. 20-21 (1921)) explained that the statute was designed to give a taxpayer sufficient notice so that he could appeal to an administrative review board. A taxpayer in disagreement with the finding of that board was required to pay the tax and file a suit for refund.

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[17] The normal deficiency procedure may be bypassed and immediate assessment of taxes determined to be due and owing may be made when the ultimate collection of the tax is determined to be in jeopardy. In such cases, the taxpayer must nevertheless be given a post-assessment notice of deficiency, which permits him to challenge the amount of the additional taxes in the Tax Court. *Laing* v. *United States*, 423 U.S. 161 (1976); see Sections 6851 and 6861 of the Code.

In 1924, Congress created the Board of Tax Appeals, an executive agency independent from the Internal Revenue Service, to provide a forum to settle tax disputes between the Commissioner and taxpayers. Revenue Act of 1924, ch. 234, Section 274(c) and (d), 43 Stat. 297. In explaining the creation of the Board as an independent agency, the Senate Finance Committee Report stated (S. Rep. No. 398, 68th Cong., 1st Sess. 8-9 (1924)) that the purpose of the measure was to provide taxpayers a right of impartial review of the Commissioner's determination without requiring payment of the taxes which was (and remains) a jurisdictional predicate to filing a refund action in a district court or the Court of Claims. By Section 504(a) and (b) of the Revenue Act of 1942, ch. 619, 56 Stat. 957, the name of the board was changed to the Tax Court of the United States, but it "continue[d] as an independent agency in the executive branch of the Government * * *." H.R. Rep. No. 2333, 77th Cong., 2d Sess. 60 (1942). In 1969, the Tax Court of the United States was renamed the United States Tax Court and made a court of the United States under Article I of the Constitution of the United States. Sections 951-962 of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 730-736; Sections 7441-7487 of the Internal Revenue Code. The Senate Report accompanying the Act, S. Rep. No. 91-552, 91st Cong., 1st Sess. 301-304 (1969) explained:

> Since the Tax Court has only judicial duties, the committee believes it is anomalous to continue to classify it with quasi-judicial executive agencies that have rulemaking and investigatory functions. The status of the Tax Court and the respect accorded to its decisions are high among those familiar with its work. However, its constitutional status as an executive agency, no matter how independent, raises questions in the minds of some as to whether it is appropriate for one executive agency to be sitting in judgment on the determinations of another executive agency.

In sum, all tax disputes are determinable only by a court in *de novo* proceedings.[18] Consequently, there is no significant difference between the disclosure sought here and the disclosure approved by the courts in disciplinary cases like *Troia*, *supra*, to facilitate the investigation of alleged criminal conduct by city officials.[19] A criminal investigation is preliminary to a judicial proceeding only in the sense that if the investigation leads to bringing charges against an accused, punishment may be imposed only in a judicial proceeding. The distance between investigation and indictment may be a long one, and, for many reasons, not all investigations result in criminal charges being brought. But because the criminal law system permits accusation and trial only in a judicial proceeding, the investigation leading to accusation or indictment has properly been held to be "preliminar[]y to" judicial involvement in the criminal process. Similarly, the Internal Revenue Code contemplates that the ultimate resolution of disputes arising under its provisions will be resolved in the Tax Court or a refund suit in a district court or the Court of Claims. Thus, whether or not any particular tax investigation ultimately will disclose that additional taxes are due, such investigations as a class are preliminary to judicial proceedings and thus within the scope of Rule 6(e)(3)(C)(i).[20]

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[18] Nor does the fact that here, "[t]he option of litigation rests with the taxpayer" (Pet. App. 15a) serve to distinguish this case from the disciplinary proceeding cases upon which the Eighth Circuit relied (see note 14, *supra*). As in those cases, the taxpayer's "option" is either to accept the agency decision—to pay the assessed tax or to accept the discipline—or to challenge it in court. In both cases, it is enough that he has the right to *de novo* judicial review of the disputed action.

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[19] Similar considerations also support the result in *In re Special February 1971 Grand Jury* v. *Conlisk*, *supra*, approving the disclosure of grand jury material to a board considering disciplinary action against policemen.

[20] Moreover, in cases such as this one, in which the grand jury investigation has resulted in the conviction of the individual whose tax liability is being investigated, it is particularly likely that the civil investigation will lead to the assessment of additional taxes.

C. The legislative history of Rule 6(e) reveals that Congress intended Rule 6(e)(3)(C)(i) to permit disclosure of matters occurring before the grand jury for use in assessing and collecting civil tax liabilities

The decision below is also contrary to strong indications in the legislative history of the 1977 amendments to Rule 6(e) that Congress intended to permit courts to order disclosure of grand jury material for use in a civil tax investigation as "preliminarily to * * * a judicial proceeding."

In 1977, Rule 6(e) was amended to permit government attorneys acting without any court order to disclose grand jury materials to agency personnel, such as Internal Revenue Service agents,[21] who are needed to assist such attorneys in grand jury proceedings and criminal law enforcement.[22] While the language at issue here was not altered by the 1977 Amendment to the Rule,[23] the Senate Report on the 1977 Amendment, S. Rep. No. 95-354, 95th Cong., 1st Sess. (1977), reflects approval of court-ordered disclosure to agencies outside the Justice Department for civil law enforcement use and specifically for tax investigations.[24] The Report explained (*id.* at 8) that potential misuse of the grand jury could be prevented by requiring that a court order authorizing disclosure be obtained, but emphasized (*ibid.*):

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[21] Congress recognized that IRS agents were among the agency personnel most likely to have expertise useful to grand juries. See, *e.g.*, S. Rep. No. 95-354, 95th Cong., 1st Sess. 6 (1977).

[22] The 1977 Amendments, *inter alia*, added the present subsections (e)(3)(A)(ii) and (e)(3)(B) to Rule 6. The course of the legislative consideration of the Amendments is explained in detail in our brief in *United States* v. *Sells Engineering, Inc.*, No. 81-1032.

[23] The court of appeals stated that the "preliminarily to" language was added to Rule 6 in 1977 (Pet. App. 3a-5a). In fact, that language was part of the Rule when it was first promulgated in 1946. The 1977 Amendment did reorganize the text of the Rule, setting out the "preliminarily to" provision as part of a separate subsection of the Rule. In light of this reorganization, Congressional attention was directed to the entire scope of Rule 6(e), and the legislative history of

> There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more re-

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the 1977 Amendments is more persuasive of the Rule's meaning than simply a subsequent Congress's view of the original intent. Cf. *FAA Administrator* v. *Robertson*, 422 U.S. 255, 267 (1975); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969); *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962); *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979).

[24] See also *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 93-94 (1977) (Statement of Professor Wayne LaFave, Reporter, Advisory Commission on Criminal Rules). Professor LaFave testified that the proposed rule would permit disclosure "in connection with a judicial proceeding, [but not] for purely administrative purposes to use in an administrative hearing," and responded affirmatively when committee counsel asked: "A tax hearing would be considered a judicial proceeding, would it not?".

> strictive than is the case today under prevailing court decisions.[13]
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>
> [13] *United States* v. *Procter & Gamble,* 356 U.S. 677, 683-684 (1958); *Robert Hawthorne, Inc.* v *Director of Internal Revenue* [406 F. Supp. 1098 (E.D. Pa. 1976)]

The citations to the "prevailing court decisions" show that Congress contemplated with approval the use of grand jury materials by the government in civil investigations, including tax investigations. While *Procter & Gamble, supra,* deals primarily with the standard for disclosure to private parties, the pages cited approve the government's civil use of grand jury materials after the grand jury investigation has concluded. In *Hawthorne, supra,* the court approved disclosure to IRS agents whose assistance was required by the United States Attorney in presenting a criminal case to the grand jury. The court's order did not prohibit the IRS agents from "utilizing [the] materials in the course of their official duties, for either criminal or civil purposes," so long as the materials remained under the protection of the United States Attorney. 406 F. Supp. at 1113. And, although the question was not squarely presented, the court also indicated that once the grand jury proceedings are concluded, there is no bar to the use of grand jury materials by the Internal Revenue Service, stating that it saw no merit "to plaintiff's contention that no civil use may ever be made of the subpoenaed material," and affirming that, "[s]o long as the government did not act in bad faith [*i.e.,* by misusing the grand jury as a subterfuge for a civil investigation], ultimate civil use is proper." *Id.* at 1119 n.35. The court explicitly recognized that once an agency such as the Internal Revenue Service has terminated its role in a grand jury investigation, it may properly petition a court for disclosure of grand jury materials under Rule 6(e) preliminarily to, or in connection with, a judicial proceeding. 406 F. Supp. at 1129 n.62. Cf. *United States* v. *Kordel*, 397 U.S. 1, 11-13 (1970). Thus, the citation in the Senate Report to the *Hawthorne* decision shows that body specifically envisioned disclosure under Rule 6(e)(3)(C)(i) for use in Internal Revenue Service civil tax investigations.[25]

The House shared this view. Immediately before it acquiesced in the Senate amendment to the bill that modified the originally proposed additions to Rule 6(e), Representative Wiggins of the House Judiciary Committee explained the effect of that amendment (123 Cong. Rec. 25195-25196 (1977)). He stated that the original proposal was designed to facilitate grand jury use of outside experts, but noted that two recent cases had led to charges that IRS agents designated to assist grand jury investigations had, without court approval, provided the grand jury materials to which they had access to others in IRS for use in a civil tax investigation. The Senate amendments were designed only to guard against such an unrestricted flow of information from the grand jury to the civil investigations. Significantly, however, Representative Wiggins concluded that (123 Cong. Rec. 25196 (1977)):

> There will come a time when a grand jury uncovers violations of civil laws, or State or local laws. It then becomes the duty of the attorney

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[25] *Hawthorne's* expression of approval of such disclosure is the only aspect of that decision that relates to the discussion in the text of the Report for which it is cited.

> for the Government, if he or some other attorney for the Government cannot act on that information, to turn it over to the appropriate governmental agency so that such agency can do its duty. However, the attorney for the Government may do this only after successfully seeking an order of the court.

He thus made it clear that the amendments were designed to prohibit *uncontrolled* access to grand jury information for the purposes of agency investigations, but that access pursuant to court order (and, in context, specifically access to assist in civil tax investigations) was entirely proper.[26]

D. Public policy considerations support reading Rule 6(e)(3)(C)(i) to permit a court order directing disclosure of grand jury materials to the IRS for a civil tax investigation

The court of appeals apparently felt that the interests protected by grand jury secrecy outweigh what it acknowledged to be the "good government purpose * * * of importance and worthy of civil pursuit" of facilitating the investigation of respondent's tax liability (Pet. App. 18a). We submit that the balance tips the other way.

In both *United States* v. *Procter & Gamble, supra,* 356 U.S. at 681-682 n.6, and *Douglas Oil Co.* v. *Petrol Stops Northwest, supra,* 441 U.S. at 219 n.10, this Court approved the summary of the interests protected by grand jury secrecy contained in *United States* v. *Rose,* 215 F.2d 617, 628-629 (3d Cir. 1954) (footnote omitted):

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure

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[26] The relevant portions of Representative Wiggins remarks are reprinted in the Appendix, *infra,* pages 1a-3a.

> the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

None of these interests is significantly jeopardized by the disclosure, pursuant to court order, of information for use in a tax investigation, particularly when, as here, the disclosure is sought only after a conviction resulting from the grand jury's investigation.[27]

In any event, the interest in grand jury secrecy is no more compromised by disclosure of grand jury materials to the Internal Revenue Service for use in determining tax liabilities than it is in any other situation in which courts have approved disclosure "preliminarily to" judicial proceedings. Information disclosed to the Internal Revenue Service will be restricted to agency use to determine tax liabilities, and access to that information will be granted only to those involved in that determination. Disclosure of such material to the Internal Revenue Service thus breaches grand jury secrecy only to the limited extent necessary for the legitimate, specific tax determination purpose. Once that purpose is accomplished, the only other potential use of the disclosed material would be under the control of a court in a judicial proceeding. The Internal Revenue Service is prohibited by statute (Section 6103 of the Internal Revenue Code) from making public disclosure of information gained during an income tax investigation. Cf. *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, 441 U.S. at 224-231. Compare *Troia*, *supra*, and *Conlisk*, *supra*.

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[27] This is the typical time frame (see, *infra*, pages 34-35). In these circumstances, the only one of the interests enumerated in *Rose* that may be affected is the fourth, if witnesses before future grand juries are discouraged from making "free and untrammeled disclosures." For the reasons stated above, we believe that effect is unlikely. See also the related discussion in our *Sells* brief, at 32-41. We are furnishing a copy of that brief to the respondent here.

On the other hand, if, as the panel majority concluded, the use of grand jury materials in a civil tax investigation were deemed not to be a use preliminary to a judicial proceeding so that disclosure may be ordered pursuant to Rule 6(e)(3)(C)(i), not only would the Service's efforts to assess and collect taxes be impeded, but also grand jury investigations of financial crimes might themselves be adversely affected. For, such an interpretation of Rule 6(e) would curtail the use of Internal Revenue Service expertise to assist such investigations, forcing alteration of the longstanding administrative practices of the Internal Revenue Service and the Department of Justice.

Section 7801 of the Internal Revenue Code requires the Secretary of the Treasury to enforce both the civil and criminal provisions of the Code. Each revenue district of the Internal Revenue Service contains an Examination Division which conducts audits to determine civil tax liabilities and a Criminal Investigation Division which investigates criminal violations of the Internal Revenue Code. Typically, criminal investigations are initiated by referral from the Examination Division upon discovery of indications of fraud during the course of tax audits. The administrative investigation then commenced is a joint investigation in which the revenue agent of the Examination Division participates under the supervision of the Criminal Investigation Division special agent. The criminal aspect of the investigation is given priority and the civil aspects of the examination are held in suspense until the conclusion of the criminal case. If the investigation leads to a determination that a crime has been committed, a recommendation that the taxpayer be prosecuted is forwarded to the Department of Justice. If prosecution is authorized, the investigative files developed during the administrative investigation form the basis of the evidence presented to the grand jury, and the special agent who supervised the joint investigation normally becomes an agent of the grand jury to assist the attorney for the government in analyzing the evidence and presenting the case.[28] In such situations, virtually all the evidence amassed during the grand jury investigation has been gathered and analyzed by Internal Revenue Service agents.[29]

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[28] It is not uncommon for the revenue agent of the Examination Division who initiated the civil tax audit also to become an agent of the grand jury to assist in the analysis of the documents and evidence obtained necessary to present the case. For example, the grand jury materials sought by the Department of Justice in *United States* v. *Sells Engineering, Inc.*, No. 81-1032, were largely developed by the revenue agent who initiated the tax audits. He and other IRS personnel devoted approximately 20,000 man-hours to the investigation as agents of the grand juries which investigated those cases. See Brief for the United States in *United States* v. *Sells Engineering, Inc.*, No. 81-1032, 1982 Term, at 39 n.37.

In addition, the expertise of Internal Revenue agents is called upon with increasing frequency by attorneys for the government conducting grand jury investigations of financial crimes, such as the one out of which this case arose, that do not originate from IRS audits. The Internal Revenue Service assigns its investigative personnel to grand jury duty in those cases because many such investigations also uncover evidence of criminal tax fraud and of unreported income and unpaid taxes. Thus, participation in grand jury investigations by Service agents is one effective way to meet the Service's dual responsibilities to enforce the criminal provisions of the Internal Revenue Code and to collect unpaid taxes. Following indictment in criminal cases in which the Internal Revenue Service has participated, the Department of Justice has routinely sought, and generally obtained,[30] orders under Rule 6(e) permitting disclosure of matters occurring before the grand jury to the Internal Revenue Service for its use in collecting the delinquent taxes uncovered and documented in the grand jury materials. This practice reflects a reasonable construction of Rule 6(e) in light of this Court's decision in *Procter & Gamble* approving the ultimate civil use of grand jury materials.

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[29] Information developed by the Service before the referral of the case to the grand jury is not covered by Rule 6(e), and thus may be used without judicial authorization in any subsequent tax investigation.

[30] *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971); *Robert Hawthorne, Inc.* v. *Director of Internal Revenue, supra.* See also *In re July 1973 Grand Jury*, 374 F. Supp. 1334 (N.D. Ill. 1973); *In re December 1974 Term Grand Jury Investigation, supra.*

But if this interpretation of Rule 6(e) were now overturned, the Service would be required either to conduct duplicate civil and criminal investigations,[31] or, more likely, to choose in most cases between criminal enforcement activities and tax collection efforts to avoid the allocation of disproportionate investigative resources to any one case.[32] Forcing the Service to make this choice would be inconsistent with the dual nature of the Service's function that this Court recognized in *United States* v. *LaSalle National Bank*, 437 U.S. 298, 308 (1978) (see also *United States* v. *Bisceglia*, 420 U.S. 141, 144-146 (1975)). The Service should not have to sacrifice its interest in collecting unpaid taxes when it carries out its criminal enforcement responsibilities, nor should it be required to limit its assistance to grand juries in order to conserve its resources to assure the collection of unpaid taxes.

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[31] If civil use of grand jury material is improper, the agents who assisted the grand jury cannot participate in the civil tax determination process since it would be impossible for them to ignore the information learned through participation in the grand jury investigation. Duplication of the investigation already conducted would be required to calculate the taxes due and owing.

In some situations, duplication of the investigation may not be possible. For example, the affidavit of the revenue agent who assisted the grand jury investigation in *United States* v. *Sells Engineering, Inc., supra* (see note 28, *supra*) stated that the agent did not believe the results of the 20,000 man-hour investigation could be duplicated even if the IRS were willing to commit almost 10 man-years to reconstruct the investigation. Affidavit of Mark F. Rogers at ¶ 14 (June 5, 1980).

[32] The difficulty is not avoided by reading Rule 6(e) to permit disclosure only after a judicial proceeding has been initiated or is a certainty, for the Service cannot make the determination of the tax deficiency (thereby prompting the initiation of litigation) without pertinent information necessary to establish the amount of, and show the existence of, the deficiency.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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September 1982

APPENDIX

MR. WIGGINS:

* * * * *

The Subcommittee on Criminal Justice devoted considerable attention to changes proposed last year by the Supreme Court to the Federal Rules of Criminal Procedure. Four of the Court's proposed changes were of special concern:

A modification of rule 6(e) to facilitate grand jury use of outside expertise;

* * * * *

The bill as originally passed by the House disapproved the Supreme Court's proposed substantive change to rule 6(e).

* * * * *

The Supreme Court intended to permit grand juries to utilize outside expertise in complicated investigations, thereby conforming the text of rule 6(e) with the commonsense interpretation afforded it in practice and by most courts. *U.S.* v. *Evans*, 526 F.2d 701, 707 (1976). *See also U.S.* v. *Hoffa*, 349 F.2d 20, 43 (1965); *U.S.* v. *U.S. District Court*, 238 F.2d 713 (4th Circuit, 1957), *cert. den., sub. nom. Valley Bell Dairy Co.* v. *U.S.*, 352 U.S. 981; *U.S.* v. *Culver*, 224 F. Supp 419, 432 (1963); *U.S.* v. *Anzelmo*, 319 F. Supp. 1106, 1116 (1970).

In the recent past, two cases dealing with rather unusual fact situations have raised legitimate questions as to the scope of rule 6(e).

In both, a grand jury investigation of criminal tax fraud on the part of a large corporation was initiated and began paralleling an Internal Revenue Service civil tax investigation of the same corporation. Personnel from the Internal Revenue Service were given access to grand jury materials to assist the prosecutor analyze the evidence against the putative defendants. The corporations contended that within the IRS grand jury evidence was being circulated and that, thusly, the grand jury was being improperly used as a tool to further a civil investigation.

Grand juries cannot be used for purposes other than the investigation of violations of the criminal law. However, the fact that a civil investigation is on-going should in no way impede initiating a grand jury investigation. Indeed, an IRS civil audit could well lead to evidence of criminal tax fraud. Both investigations must then go forward. However, grand jury information must not flow to the civil investigation although the converse is not necessary or desirable.

The practical effect of the Senate amendment to rule 6(e) is that a Government agent receiving grand jury information from an attorney for the Government becomes, to that extent, an employee of the grand jury. He is not free to share such information within the agency which directly employs him, even though it might be useful and relevant to the mission of that agency. Materials produced before a grand jury must be held secret by that grand jury and, must remain within the control of the Attorney General or his assistants, or the U.S. attorney or his assistants, to be used by them in the performance of their duties.

There will come a time when a grand jury uncovers violations of civil laws, or State or local laws. It then becomes the duty of the attorney for the Government, if he or some other attorney for the Government cannot act on that information, to turn it over to the appropriate governmental agency so that such agency can do its duty. However, the attorney for the Government may do this only after successfully seeking an order of the court.

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Respondent's
Brief

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In The

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES E. BAGGOT,
Respondent.

On A Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT JAMES E. BAGGOT

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QUESTIONS PRESENTED FOR REVIEW

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1. Whether disclosure of secret grand jury materials for a proposed Internal Revenue Service civil tax investigation is "preliminarily to * * * a judicial proceeding" under Federal Rule of Criminal Procedure 6(e)(3)(C)(i).

2. Whether disclosure of secret grand jury materials is barred by the government's failure to satisfy the standard of particularized need.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

RULE INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT:

I.

Disclosure Of Grand Jury Materials For A *Proposed* IRS Civil Tax Investigation Is Not "Preliminarily To * * * A Judicial Proceeding" As Required By Rule 6(e)(3)(C)(i) 9

A. The Embryonic And Speculative Status Of This Administrative Matter Makes The Likelihood Of A Judicial Proceeding Too Remote For Disclosure 9

B. Established Authority Bars Disclosure In Aid Of IRS Administrative Tax Investigations 18

C. The Definitive Line Of Authority Bars Disclosure For Any Administrative Investigation 20

D. The Cases Relied On By The Government Unreasonably Expand Rule 6(e)(3)(C)(i) Into A Rule For Automatic Disclosure 23

II.

Disclosure Is Barred By The Government's Failure To Satisfy The Particularized Need Standard Pronounced By This Court 29

A. The Court Of Appeals Applied The Correct Standard Of Particularized Need And Properly Maintained Grand Jury Secrecy 29

  1. The Request For Disclosure Fails To Satisfy the Requirements Of *Douglas Oil* 31

    a. The Grand Jury Materials Are Not Sought To "Avoid A Possible Injustice In Another Judicial Proceeding" 32

    b. The Extensive Powers Of IRS To Compel Discovery Belie Its Need For Grand Jury Materials 32

    c. The Request For Disclosure Was Overly Broad And Unparticularized 33

  2. Authoritative Decisions Strongly Reject The Government's Suggested Test For Disclosure 34

B. The Government Urges Inconsistent Arguments In *Baggot* And *Sells* 36

III.

The Legislative History Of Rule 6(e) Does Not Support Disclosure Of Grand Jury Materials For Civil Tax Investigations 38

IV.

The IRS Tail Seeks To Wag The Grand Jury Dog By Having This Court Legislate A Special Exception To 6(e) For The Benefit Of IRS 46

CONCLUSION 56

APPENDICES:

A—Rule Involved—Fed.R.Crim.P. 6(e) 1a

B—Information 3a

C—Fed. R. Crim. P. 6(e) (1946) 6a

D—Pertinent Portion of Typical Plea Agreement .. 7a

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 27

Abel Investment Co. v. United States, 53 F.R.D. 485 (D. Neb. 1971) 14

Atwell v. United States, 162 F.97 (4th Cir. 1908) .. 38

Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980) 22, 26, 35

Cohen v. Commissioner, 42 T.C.M. (CCH) 312 (1981) 20, 36, 54

Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958) 25, 26

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) .... *passim*

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) 13

In re April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1956) 37

In re April 1977 Grand Jury Proceedings, 506 F. Supp. 1174 (E.D. Mich. 1981), *appeal pending*, No. 80-1182 (6th Cir.) .... *passim*

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In re Grand Jury Matter, 495 F.Supp. 127 (E.D. Pa. 1980) 22, 23

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In re J. Ray McDermott & Co., 622 F.2d 166 (5th Cir. 1980) 21, 22, 34, 35

In re John Doe, 537 F.Supp. 1038 (D.R.I. 1982) 36

In re Judge Elmo B. Hunter's Special Grand Jury, 667 F.2d 724 (8th Cir. 1981) 23, 24, 25

In re July 1973 Grand Jury, 374 F.Supp. 1334 (N.D. Ill. 1973) 54

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In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971) 54

In the Matter of Disclosure of Testimony Before The Grand Jury, 580 F.2d 281 (8th Cir. 1978) 25

In the Matter of Grand Jury Proceedings, Miller Brewing Co., 687 F.2d 1079 (7th Cir. 1982) ...... *passim*

Peterson v. United States, 52 F.R.D. 317 (S.D. Ill. 1971) 14

Petition of the United States for the Disclosure of Grand Jury Matters (Miller Brewing Company), (E.D. Wis. 1981) 16

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959) 3, 7, 8, 9, 30, 37, 49

Robert Hawthorne, Inc. v. Director of Internal Revenue Service, 406 F.Supp. 1098 (E.D. Pa. 1976) 7, 43, 45, 54

Schmidt v. United States, 115 F.2d 394 (6th Cir. 1940) 38

Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973) 25

State of Texas v. United States Steel Corp., 546 F.2d 626 (5th Cir. 1977) 35

United States v. American Medical Association, 26 F.Supp. 429 (D.D.C. 1939) 38

United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980) 22, 25, 26

United States v. Bisceglia, 420 U.S. 141 (1975) 51

United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982) 14

United States v. LaSalle National Bank, 437 U.S. 298 (1978) 53

United States v. Procter & Gamble Co., 356 U.S. 677 (1958) .... *passim*

United States v. Sells Engineering, Inc., et al., *cert. granted*, ... U.S. ....., 102 S.Ct. 2034 (1982) (No. 81-1032) 5, 8, 29, 30, 35, 36, 37, 48

United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980) 25, 26, 52

United States v. Young, 494 F.Supp. 57 (E.D. Tex. 1980) 22, 36

Statutes and Rules

5 U.S.C. §701 *et seq.* 27

7 U.S.C. §6c(a)(A) 2, 13

15 U.S.C. §717 *et seq.* 21

18 U.S.C. Fed. R. Crim. P.:
  Rule 6(e) .... *passim*
  Rule 6(e)(2) 2, 3, 9, 42, 50
  Rule 6(e)(3)(A)(ii) 39, 42, 50
  Rule 6(e)(3)(B) .... *passim*
  Rule 6(e)(3)(C)(i) .... *passim*

26 U.S.C. §6103 .... 8, 50

26 U.S.C. §6103(b)(2) 50

26 U.S.C. §6103(k)(6) 50

26 U.S.C. §§6201-6216 11

26 U.S.C. §6213(a)	12
26 U.S.C. §6213(c)	13
26 U.S.C. §7601	51
26 U.S.C. §7602	51
26 U.S.C. §§7602-7609	8, 51
28 U.S.C. §1340	13
31 U.S.C. §§231-235	25
46 U.S.C. §814	22
46 U.S.C. §830	22

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18 U.S.C. App.	38
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Reg. §301.6103(k)(6)-1(b)	50
Reg. §601.103(c)(3)	13
Reg. §601.105(b)(4)	12
Reg. §601.106(a), (b)	12
Reg. §601.106(d)(2)	12
H.R.Rep. No. 95-195, 95th Cong. 1st Sess. (1977)	49
Internal Revenue Manual 9267.21 (CCH) Vol. 5, p. 28,053-3 (1982)	51
Internal Revenue Manual 9781-348.2(2) (CCH) Vol. 6, p. 28,691 (1982)	50
Kirkland, Administrative Agency Access to Grand Jury Material Under Amended Rule 6(e), 29 Case Western L.Rev. 295 (1978)	42

Note, Administrative Agency Access to Grand Jury Materials, 75 Colum. L. Rev. 162 (1975) 31, 53

123 Cong. Rec. 11109 (1977) 45

123 Cong. Rec. 11111 (1977) 49

123 Cong. Rec. 25193-25196 (1977) 6, 7, 39, 45, 50

Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess. (1977) 41

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S.Rep. No. 95-354, 95th Cong., 1st Sess., reprinted in [1977] U.S. Code Cong. & Ad. News 527 .... 7, 42

Tax Equity and Financial Responsibility Act of 1982, §§331-333 51

Your Federal Income Tax, Publication 17 (Rev. Nov. 81) 12

In The

Supreme Court of the United States

October Term, 1982

No. 81-1938

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES E. BAGGOT,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT JAMES E. BAGGOT

OPINIONS BELOW

The opinion and supplemental opinion of the court of appeals (Pet. App. 1a-32a) are reported at 662 F.2d 1232. The memorandum opinion and order of the district court (Pet. App. 33a-48a) is not reported.

RULE INVOLVED

Federal Rule of Criminal Procedure 6(e) is set forth in the Appendix, 1a-2a, *infra*.

STATEMENT OF THE CASE

Respondent relies on the facts set forth in his Brief in Opposition to the Petition for a Writ of Certiorari, pp. 2-10.

Additionally, the Court should be aware of the following:

1. The government has conceded that all of the materials sought for disclosure by Internal Revenue Service ("IRS") are "matters occurring before the grand jury" within the meaning of Fed.R.Crim.P. 6(e)(2), (Pet. 14 n.8).

2. The government admits that disclosure of grand jury material is sought for a *proposed* civil tax investigation of Respondent (Pet. 18, 19 n.12 at 20).

3. Respondent was not charged with, nor did he plead guilty to, any tax related violation of criminal law. Respondent was charged in a two count information with misdemeanor violations of the Commodity Exchange Act, 7 U.S.C. §6(c). Respondent pled guilty to those commodity violations. The information is set forth in the Appendix, 3a-6a, *infra*.

SUMMARY OF ARGUMENT

The historic principle of grand jury secrecy may not be abrogated for a *proposed* IRS administrative tax investigation. This Court has declared that the secrecy of grand jury proceedings may be discretely and limitedly lifted only upon a showing of particularized and compelling need. *United States v. Procter & Gamble, Co.*, 356 U.S. 677, 682-83 (1958) ("*Procter & Gamble*"); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 221-23 (1979) ("*Douglas Oil*"). Rule 6(e) of the Federal Rules of Criminal Procedure embodies the principle of grand jury secrecy and prescribes the specific exceptions which permit limited disclosure of grand jury materials. The relevant exception under Rule 6(e) provides that a court may permit disclosure that is "preliminarily to . . . a judicial proceeding." Fed.R.Crim.P. 6(e)(3)(C)(i). That exception and the particularized need standard create a two part test for discretely lifting the veil of secrecy. The court of appeals correctly determined that the government's request for disclosure failed both criteria.

It is conceded that disclosure of grand jury materials is sought in aid of a *proposed* IRS civil tax investigation of Respondent. IRS has not assessed a tax deficiency against Respondent nor has it initiated an investigation of a possible civil tax liability. IRS has chosen, instead, to procure the grand jury's work product to perform its administrative duties. The complex administrative IRS procedures attendant to a determination, assessment and collection of an uncertain tax deficiency make it extremely unlikely that disclosure here is preliminary to a judicial proceeding. The court of appeals correctly held that IRS's need is "too embryonic, speculative and uncertain" to characterize disclosure as anything more than preliminary to a "type of administrative proceeding or investigation." (Pet. App. 16a).

Prevailing decisions expressly proscribe breaching grand jury secrecy in aid of administrative investigations. When an administrative agency seeks disclosure of grand jury materials and a judicial proceeding is a remote possibility or speculative, courts bar disclosure. Disclosure is particularly inappropriate when an administrative agency could obtain information it seeks through its own forsaken investigatory process, such as IRS has done here. Disclosure for purely administrative purposes is too attenuated from a judicial proceeding to warrant sacrificing grand jury secrecy.

The government's suggested interpretation of "preliminarily to" imprudently centers on whether a statutory scheme is "designed to culminate" in a judicial proceeding. That reading of Rule 6(e)(3)(C)(i) unreasonably expands the intended limitations of the judicial proceeding exception. Almost any administrative action could lead eventually to a judicial proceeding and, therefore, qualify as preliminary to that proceeding. The government's approach would provide carte blanche to every federal agency that requests disclosure. Adoption of an overly broad interpretation of Rule 6(e)(3)(C)(i) would emasculate the principle of grand jury secrecy and destroy the integrity of the grand jury function.

Disclosure is also barred because the government failed to make a showing of particularized need for the grand jury materials. The government attempts to confine the decision of the court of appeals to the "preliminarily to" exception because of its failure to satisfy the particularized need test. The court of appeals faithfully observed the teachings of *Procter & Gamble* and *Douglas Oil* in denying disclosure.

The government failed to satisfy the three part test of *Douglas Oil* for determining particularized need. 441 U.S. at 222. That failure precludes access to grand jury materials regardless of the interpretation of 6(e)(3)(C)(i).

The overwhelming weight of authority upholds the particularized need test for *all* disclosure requests including those made by the government. No authoritative case decided since *Douglas Oil* has advocated a different standard of disclosure for the government than for private parties. The requirement of particularized need guards the integrity of the grand jury process by permitting disclosure only to avoid injustice in another judicial proceeding.

In *United States v. Sells Engineering, Inc., et al., cert. granted*, ... U.S. ....., 102 S.Ct. 2034 (1982) (No. 81-1032) ("*Sells*"), the government advocates rejection of the particularized need test. It urges a standard for disclosure which requires only a "rational relationship" between grand jury materials and a civil proceeding. In *Matter of Grand Jury Proceedings, Miller Brew. Co.*, 687 F.2d 1079, 1091 (7th Cir. 1982), the court rejected the suggested diminished standard noting that a showing of rational relationship "may explain the government's desire for disclosure, but does not determine the degree of necessity." *Miller* further held that governmental agencies should not be afforded "special treatment." *Id.*

A principal reason for the stringent requirement of particularized need is to prevent abuse of the powerful grand jury process by administrative agencies for civil investigatory purposes. The combined effect of decisions favorable to the government in *Baggot* and *Sells* would virtually eliminate both criteria for disclosure and permit unfettered agency access to grand jury materials without meaningful judicial control. In order to preserve the integrity of the grand jury system, the particularized need standard should be applied to government requests for disclosure.

The legislative history of Rule 6(e) and of its 1977 amendments establish that Congress did not intend to permit disclosure of grand jury materials for use in civil tax investigations as "preliminarily to . . . a judicial proceeding." The court of appeals properly held that, if Congress had intended disclosure of grand jury materials for a civil tax investigation, "it could easily have provided for it." (Pet. App. 17a).

The words of the "preliminarily to" exception have remained unchanged since Rule 6(e) was adopted in 1946. There is nothing in the Advisory Committee Notes of the original Rule that indicates congressional approval of disclosure to an administrative agency for civil purposes. The government does not argue otherwise.

The legislative history of the 1977 amendments to Rule 6(e) shows that Congress intended no change regarding disclosure under the "preliminarily to" exception and demonstrates the correctness of the decision below.[1] The purpose of the 1977 amendments was limited to providing agency assistance to government attorneys in enforcing federal criminal law. The amendments did not provide access to grand jury materials by an administrative agency for use in civil investigations. Representative Wiggins of the House Judiciary Committee pointed out that an attorney for the government could turn over grand jury information to a governmental agency "only after successfully seeking an order of the court." 123

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[1] Speaking in support of the amendment, Representative Mann explained that the "preliminarily to" exception was not involved in the proposed amendments to Rule 6(e) and that there was no intention to change established practice regarding that exception. 123 Cong.Rec. 25194-25195 (1977).

Cong. Rec. 25196 (1977). Here the government sought an order of court and was not successful. The court of appeals correctly noted that congressional legislation did not "authorize disclosure for any good government purpose." (Pet. App. 18a). To grant disclosure would frustrate the express intent of Congress to prevent leakage back to the administrative agency of information disclosed during the course of providing assistance in enforcing federal criminal law.

In considering the 1977 amendments, the Senate Judiciary Committee did not change the "preliminarily to" language that is now 6(e)(3)(C)(i). The Senate Report noted that disclosure under that exception should be in accord with "prevailing court decisions" and cited *Procter & Gamble* and *Robert Hawthorne, Inc. v. Director of Internal Revenue Service,* 406 F.Supp. 1098 (E.D. Pa. 1976). S.Rep. No. 95-354, 95th Cong., 1st Sess. reprinted in [1977] U.S. Code Cong. & Ad. News, p. 531. *Procter & Gamble* established particularized need as the standard for disclosure and *Hawthorne* imposed strict safeguards on agencies assisting a grand jury to prevent abuse for civil purposes. 406 F.Supp. at 1125-1130. Thus, Congress exhibited a deep concern over disclosure of secret grand jury materials and through the 1977 amendments provided safeguards to prevent abuse of the grand jury by agencies assisting in the enforcement of criminal law. It is wholly inappropriate for the government to urge this Court to judicially amend Rule 6(e) to suit its purposes.

The policy arguments which the government urges are not appropriate. The Solicitor seeks to subordinate the interests of the grand jury and the criminal justice system to the assessment of taxes. The functioning of future grand juries will be impeded because witnesses will not testify freely if they know that their testimony will be given to administrative agencies. In *Pittsburgh*

Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959), Justice Clark noted that the testimony of grand jury witnesses would be "parsimonious" if they knew their testimony would be published, stating further that to make public any part of grand jury proceedings "would inevitably detract from its efficacy."

IRS has extraordinary statutory powers to ascertain civil tax liabilities. See 26 U.S.C. §§7602-7609. IRS has not used any of its powerful investigative tools in its proposed *Baggot* investigation. It has merely sat back awaiting the requested grand jury materials. It is specious to argue that without disclosure, the ability of IRS to assess taxes will be impeded.[2]

It is unseemly for the government to attempt to pressure this Court by threatening to withhold cooperation from future grand juries if a liberal disclosure policy is not established. IRS is not entitled to a *quid pro quo* for its services to the grand jury.[3]

If the Court grants disclosure based on theories advocated by the government in *Baggot* and *Sells*, the grand jury system will be decimated. Such a result would be directly contrary to the will of Congress as expressed in the 1977 amendments to 6(e) and to prior holdings of this Court. The court of appeals properly declined to create a special exception to Rule 6(e) to pursue Mr. Baggot's possible civil tax deficiency.

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[2] The government also seeks disclosure to avoid duplication. Administrative convenience is not a sufficient reason to breach grand jury secrecy. *Procter & Gamble*, 356 U.S. at 682.

[3] The government guilefully advises that disclosure can be made to IRS because it is prohibited by statute from making redisclosure. (26 U.S.C. §6103). The multitudinous exceptions to that statute make a mockery of the suggested confidentiality.

ARGUMENT

I.

DISCLOSURE OF GRAND JURY MATERIALS FOR A *PROPOSED* IRS CIVIL TAX INVESTIGATION IS NOT "PRELIMINARILY TO * * * A JUDICIAL PROCEEDING" AS REQUIRED BY RULE 6(e)(3)(C)(i).

Prevailing decisional law and the express provisions of Rule 6(e) of the Federal Rules of Criminal Procedure preclude disclosure of grand jury materials to IRS for use in conducting a proposed civil investigation of Respondent's possible tax liability. The request for disclosure made by the government on behalf of IRS was correctly denied by the court of appeals for two fundamental reasons. First, at no point in its attempts to obtain disclosure has the government demonstrated a particularized and compelling need for the grand jury materials (Pet. App. 10a). *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 221-23 (1979). Second, IRS has done nothing except express a desire to investigate Respondent's possible tax liability. Thus, the court of appeals reasoned that disclosure would only be preliminary to a type of administrative proceeding or investigation which is not authorized under Rule 6(e)(3)(C)(i). (Pet. App. 16a).

A. The Embryonic And Speculative Status Of This Administrative Matter Makes The Likelihood Of A Judicial Proceeding Too Remote For Disclosure.

Disclosure of grand jury materials is improper because of the embryonic status of the administrative investigation of Respondent.[4] The relationship between disclosure for IRS's *proposed* investigation of Respondent's possible tax deficiency and a "judicial proceeding" is too attenuated and speculative for this Court to permit the government to invade the sanctuary of grand jury secrecy.

A judicial proceeding is at best a mere possibility. IRS has performed no investigation. It has not assessed a tax deficiency against Respondent. It has done nothing except await disclosure of grand jury materials. The record is utterly devoid of any effort on the part of IRS to obtain information needed to ascertain a possible tax deficiency of Respondent through its own investigation. Instead, IRS chose to utilize the grand jury's work product by requesting the United States Attorney to peruse secret grand jury materials and procure information and documents necessary to investigate the civil tax liability of Respondent Baggot for 1975.

The IRS request, embodied in a letter written by James Kopidlansky, Chief, IRS Examination Division, illustrates the numerous contingencies which make it extremely improbable that an investigation of Respondent Baggot will result in a judicial proceeding. The letter states, in pertinent part:

> [I]t was noted that Baggot *avoided and possibly evaded* his taxes . . . .
>
> * * *
>
> I am requesting that a Rule 6(E) [sic] order for civil purposes be obtained for 1975 due to the following reasons: (1) to obtain the information and documents *which would be needed to determine the*

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[4] The government concedes in its Petition that there is only a "*proposed*" IRS civil tax investigation of Respondent. (Pet. 18, 19 n. 12 at 20).

> *correct tax liability* of Baggot for 1975 . . . and (4) the statements of the witnesses and the documents which would be needed in a judicial proceeding *if the taxpayer does not agree to the additional tax being assessed.*
>
> * * *
>
> The judicial proceeding as mentioned in item four pertains to Tax Court proceedings. *When a taxpayer does not agree* with Revenue Agent's tax adjustments and after a statutory notice has been issued, the taxpayer will petition the Tax Court for judicial determination. It is our belief that the Internal Revenue Service procedures which provide that every *non-agreed* case goes to the Tax Court for settlement (*unless the taxpayer decides to agree at any stage of the legal proceedings*) constitutes a judicial proceeding . . .

(Br. Opp. App. 3a-4a) (emphasis supplied).[5]

As the Kopidlansky letter indicates, the possibility of a judicial proceeding depends solely upon a taxpayer's decision to agree or disagree with additional taxes assessed, if any.[6] The complex IRS administrative procedures which precede any judicial proceeding make it extremely unlikely that there will ever be a judicial proceeding. The Internal Revenue Code provides that income taxes may not be assessed until IRS sends the taxpayer a notice of deficiency, 26 U.S.C. §§6201-6216. The panoply of administrative prerequisites to a notice of deficiency is set forth, *inter alia*, in the Federal Tax Regulations. Those regulations state the procedure for investigation and audit of a taxpayer's return and for administrative determinations in the event the taxpayer does not agree with the auditing results.

---

[5] The speculative nature of the subject letter is highlighted by the words "Baggot avoided and possibly evaded his taxes . . . ." It is, of course, not improper to avoid taxes. Balter, Tax Fraud and Evasion, §2.3 (3d ed. 1963).

[6] Even this contingency assumes that IRS has at least investigated to determine if there is a deficiency by the taxpayer—an event which has not occurred in the present case.

> At the conclusion of an office or field examination, the taxpayer is given an opportunity to agree with the findings of the examiner. If the taxpayer does not agree, the examiner will inform the taxpayer of the appeal rights. If the taxpayer does agree with the proposed changes, the examiner will invite the taxpayer to execute either Form 870 or another appropriate agreement form. Fed. Tax Regs. Vol. 3 [§601.105(b)(4) (1982) (hereinafter "Reg. § . . .")].

Thus, if the taxpayer agrees with the findings of the examiner, the tax is assessed and the matter ends.

Should a taxpayer disagree with the findings of an examining agent, he is afforded the opportunity of an administrative appeal within IRS to the Appeal Office [Reg. §601.106(a), (b)].[7] At the administrative appellate level the taxpayer may agree with the findings of the examining agent and thus conclude the matter by executing Form 870-AD [Reg. §601.106(d)(2)].

If there is no agreement at the administrative level, IRS may issue a 90 day notice of deficiency. The notice of deficiency gives the taxpayer the option, within 90 days, to do one of the following:

1. pay the tax and conclude the matter;
2. file a petition in the Tax Court of the United States challenging the deficiency [26 U.S.C. §6213(a)];

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[7] IRS in fact *urges* the unagreed taxpayer to appeal the examiner's findings within IRS rather than the courts. *Your Federal Income Tax*, Publication 17, p.27 (Rev. Nov. 81).

3. pay the tax and file a claim for a refund with IRS in order to obtain standing to sue the United States in the United States District Court for said refund [Reg. §601.103(c)(3), 28 U.S.C. §1340];
4. do nothing, have the tax assessed after 90 days, pay the tax and conclude the matter [26 U.S.C. §6213(c)];
5. neither pay the tax nor contest the deficiency and await IRS action, if any.

Thus, there is no doubt that it is entirely within the discretion of a taxpayer as to whether or not the administrative process will ever result in a judicial proceeding.

The government's brief distorts IRS procedures and exaggerates the likelihood of actual litigation in this case. The government's representation of the "statutory scheme" for tax collection is erroneously premised upon the rare instance when a taxpayer contests a deficiency assessment through the entire process. (Gov. Br. 21-23). IRS collection procedures are clearly designed to be independently enforceable rather than a vehicle for judicial review. See *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 351 n.18 (1977). "Only the taxpayer can initiate litigation to test the validity of the deficiency because the IRS has no need for litigation. Unless the taxpayer takes the matter to court, the IRS determination of the deficiency is final." *In re April 1977 Grand Jury Proceedings*, 506 F.Supp. 1174, 1181 (E.D. Mich. 1981), *appeal pending*, No. 80-1182 (6th Cir.) ("*General Motors*").

The facts of this case demonstrate that litigation is highly unlikely to occur. Contrary to material distortions in the government's brief (Gov. Br. 15, 26 n. 20), the guilty plea of Respondent had no relation to any tax violation. He pled to an information charging misdemeanor violations of the Commodity Exchange Act, 7 U.S.C. §6c(a)(A), which made absolutely no reference to or suggestion of understatements of income in Respondent's tax returns (App. 3a-6a). Further, there is only a *proposed* civil investigation of Respondent. There is no tax assessment against him. If an assessment is made, the government has no idea whether there will be a judicial proceeding and no control over whether such a proceeding will occur. It is therefore particularly *unlikely* that disclosure would be preliminary to a judicial proceeding.

Statistical information from IRS Annual Reports of the Commissioner of Internal Revenue substantiates the improbability of a judicial proceeding resulting from any investigation. For the last four years, an average 92% of tax audits were resolved at the audit level. At the administrative appeals level 77% of the remaining cases were disposed of by agreement within IRS. Significantly, only 1% of the returns examined from 1978 to 1981 resulted in litigation.[8] The government's assertion that IRS examinations are "designed to culminate" in a judicial proceeding is unpersuasive since the likelihood of a judicial proceeding is practically non-existent.[9] There is no proceeding pending against Respondent and there can be no judicial review, contemplated or otherwise, of a nonexistent proceeding.

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[8] Annual Report of the Commissioner of Internal Revenue, 1979-1980, Table 12; 1981, Table 11.

[9] The purely administrative nature of IRS civil tax investigations is supported by the rule that IRS field reports and appellate conferee reports are "not prepared in anticipation of litigation". *Peterson v. United States*, 52 F.R.D. 317, 320-21 (S.D.Ill. 1971). This is based upon the observation that "[l]itigation cannot be anticipated in every such case when relatively few result in litigation." *Id.* at 321. In *Abel Investment Co. v. United States*, 53 F.R.D. 485, 490 (D.Neb. 1971), the court found unpersuasive the suggestion that an audit report was prepared in anticipation of litigation merely because it was part of a supposed chain that might lead to litigation. See also *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982) (citing *Abel Investment* and *Peterson* with approval).

After considering the foregoing, the court of appeals concluded:

> [T]he present Internal Revenue Service civil investigation of Baggot's possible additional tax liabilities is too embryonic, speculative, and uncertain to firmly say that it is "preliminarily to" a judicial proceeding.
>
> It is at best, with no judicial proceeding now pending and with the possibility that none may result only preliminary to and in connection with, not a judicial proceeding, but a type of administrative proceeeding or investigation.

(Pet. App. 16a) (citations omitted).[10]

The opinion of the court of appeals clearly did not establish an unreasonably narrow and restrictive interpretation of Rule 6(e)(3)(C)(i) as claimed by the government. The court's decision was based upon the nebulous status of the possible IRS investigation supported by the fact that no deficiency had been assessed. Contrary to the government's assertion, nowhere in its opinion does the court of appeals advocate a "virtual certainty" standard for disclosure under Rule 6(e)(3)(C)(i). Nor did the court indicate that Rule 6(e) precludes disclosure "whenever there is a possibility that the anticipated judicial proceeding will not occur" (Gov. Br. 16). The holding of the court is that this matter is too embryonic, speculative and uncertain to condone disclosure as preliminary to a judicial proceeding. The government's suggested interpretation of Rule 6(e) would *ipso facto* allow complete disclosure of grand jury materials merely upon IRS's general desire to investigate. Such a *per se* rule of disclosure for the benefit of IRS totally disregards the tenets of grand jury secrecy.

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[10] The court's holding is truncated and misrepresented by the government's brief which claims that the court found that "'the possibility that [no judicial proceeding] may result' may be sufficient to render the provision inapplicable". The court's correct finding is fully quoted above and was based upon the inactivity of IRS in proceeding against Respondent. *See, In the Matter of Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079, 1094 (7th Cir. 1982) (repeating the above-quoted finding).

The court's holding in *Baggot* was affirmed and complemented by its recent decision, *In the Matter of Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079, 1094 (7th Cir. 1982) ("*Miller*"). The court took the opportunity in *Miller* to analyze once again the "preliminarily to" exception under Rule 6(e)(3)(C)(i). In *Miller*, a grand jury investigation into the tax affairs of Miller Brewing Co. was terminated without the return of any indictments. Shortly thereafter, the government filed a petition under Rule 6(e) for disclosure of certain grand jury materials to IRS for civil tax investigation purposes.

The district court permitted disclosure of the requested documents to IRS and denied IRS disclosure of the requested transcripts. *Petition of the United States for the Disclosure of Grand Jury Matters (Miller Brewing Co.)*, 518 F. Supp. 163 (E.D. Wis. 1981). On appeal Miller argued, *inter alia*, that the proposed disclosure to IRS for its civil investigation was not "preliminarily to or in connection with a judicial proceeding" within the meaning of Rule 6(e)(3)(C)(i). *Miller*, 687 F.2d at 1094.

In addressing the request for disclosure, the court provided a meaningful framework for disclosure of grand jury materials under Rule 6(e)(3)(C)(i). Speaking for the court, Judge Harlington Wood described the holding in *Baggot*:

> In *Baggot*, no deficiency had been assessed. Whether there would ever be a judicial proceeding depended on whether a deficiency was ever assessed, and then whether Baggot decided to pay or contest it. There-

> fore, we found "that the . . . Internal Revenue Service civil investigation of Baggot's possible additional tax liabilities is too embryonic, speculative, and uncertain to firmly say that it is 'preliminarily to' a judicial proceeding." *Baggot*, 662 F.2d at 1239; *see In re April 1977 Grand Jury Proceedings*, 506 F. Supp. 1174 (E.D. Mich. 1981); *In re 1978-1980 Grand Jury Proceedings*, 503 F.Supp. at 48.

687 F.2d at 1094.

The Court then compared the requests for disclosure in *Baggot* and *Miller* in terms of IRS's efforts to investigate the respective possible tax deficiencies:

> The situation in Miller, however, is quite different since the tax investigation is more advanced. At the time that the district court permitted disclosure of the grand jury documents to the government, it could be certain that there would be a "judicial proceeding" of some kind. The government had assessed a deficiency and Miller stated in an affidavit that it "will be compelled, within 90 days of the issuance of such statutory notice of deficiency, to commence an action contesting such deficiencies in the United States Tax Court." Moreover, Philip Morris did, in fact, petition the tax court after the deficiency was assessed. Therefore, disclosure was "preliminarily to or in connection with a judicial proceeding."

687 F.2d at 1094.[11]

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[11] The *Miller* court's analysis of disclosure under Rule 6(e) was made in the context of the "preliminarily to" exception rather than "in connection with". This is demonstrated by the emphasis placed by the court on the activities of IRS in issuing a notice of deficiency and of Miller Brewing Co. in attesting to its intent to contest the notice of deficiency and subsequently filing a petition in the Tax Court. Since disclosure was sought prior to those actions which *a priori* precede judicial proceedings in the Tax Court, the court's opinion determined the propriety of the "preliminarily to" exception.

Thus, in *Miller*, the dispute between IRS and the taxpayer had matured and they embarked upon litigation. Respondent stands at the other end of the spectrum where IRS has neither assessed a deficiency nor investigated Respondent's possible tax liability. Hence, the proposed investigation is too "embryonic, speculative and uncertain" to warrant invading the sanctuary of grand jury secrecy.

B. Established Authority Bars Disclosure In Aid Of IRS Administrative Tax Investigations.

Contrary to the government's declaration that the *Baggot* decision "reversed a long standing administrative interpretation of Rule 6(e)" (Gov. Br. 15), the settled weight of authority supports the denial of disclosure by the court of appeals. In *Baggot* and *Miller*, the Seventh Circuit cited the well reasoned opinions in *General Motors, supra,* and *In re 1978-1980 Grand Jury Proceedings*, 503 F.Supp. 47 (N.D. Ohio 1980). Those cases are directly on point and establish that disclosure of grand jury materials is clearly not "preliminarily to" a judicial proceeding when sought in aid of an administrative investigation of a possible tax deficiency rather than for actual use in a specifically contemplated judicial proceeding.

In *General Motors*, the district court denied a government motion under Rule 6(e)(3)(C)(i) for disclosure of certain subpoenaed documents, transcripts and work papers of the grand jury for IRS's civil use in the ascertainment, assessment and collection of the revenue. Like *Baggot*, no notice of deficiency had been issued. The salient factors which influenced the court to deny disclosure to IRS may be summarized as follows:

1. There must be an actual controversy over an adverse determination at the administrative level. 506 F.Supp. at 1179.

2. *Douglas Oil, supra*, requires that the grand jury materials be intended for an actual use in a specifically contemplated lawsuit. *Id.*, at 1180.
3. Disclosure is not permitted if sought in aid of an administrative investigation into possible violations. *Id.*
4. The possibility of a judicial proceeding is even more remote if the agency has not attempted to utilize its own investigatory process, but instead relies on disclosed grand jury materials to save time or money. *Id.*, at 1180-81.
5. A judicial proceeding is more remote if the administrative agency has independent enforcement authority. *Id.*, at 1181.
6. Only the taxpayer can initiate litigation and unless the taxpayer contests a deficiency in court the IRS determination is final. *Id.*

On the basis of the foregoing analysis and the "overwhelming weight of authority," the *General Motors* court held that "the use for which disclosure is now sought is not preliminary to a judicial proceeding." 506 F.Supp. at 1181.

In the instant case, the *General Motors* factors are similarly lacking: (1) there is no actual controversy since IRS has not even instituted an investigation of Respondent's civil tax liability; (2) IRS has no specified use for the materials in any contemplated judicial proceeding; (3) the materials are sought in aid of IRS's proposed administrative investigation; (4) IRS has utilized none of its statutory discovery tools; (5) IRS clearly possesses independent enforcement authority for the ascertainment of tax deficiencies; and (6) Respondent has numerous opportunities at the administrative level to obviate a judicial proceeding.

In *In re 1978-1980 Grand Jury Proceedings*, 503 F. Supp. 47 (N.D. Ohio 1980), the court similarly rejected an IRS attempt to facilitate the determination of a taxpayer's possible tax liability by the use of secret grand jury materials. Again, there was no notice of deficiency. Consistent with the analyses of *Baggot*, *Miller* and *General Motors* the court denied disclosure to IRS because the contemplated use of the materials was "purely administrative." 503 F.Supp. at 48. The court observed that the likelihood of a judicial proceeding arising out of a tax investigation is purely speculative and that disclosure to facilitate a determination of a tax liability is not sufficient to qualify under the exception. *Id.*

A recent decision in the Tax Court by Judge Wilbur critically undermines the "longstanding administrative interpretation" argument asserted by the government (Gov. Br. 15). In *Cohen v. Commissioner*, 42 T.C.M. (CCH) 312 (1981), the tax court prohibited IRS from using grand jury materials obtained in violation of Rule 6(e) in a civil tax case. The court stated that, "a federal agency may not obtain disclosure under Rule 6(e) for the purpose of an administrative investigation, as the grand jury material in those circumstances is not sought for use in a judicial proceeding." *Id.*, at 318. There is no question in the present case that the grand jury materials are sought for a proposed IRS administrative investigation. That use is expressly rejected by *Cohen* and the preceding IRS-related cases.

C. The Definitive Line Of Authority Bars Disclosure For Any Administrative Investigation.

The genesis of the weight of authority which prohibits disclosure of grand jury materials for administrative investigations or procedures under Rule 6(e)(3)(C)(i) was the opinion in *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962). In that case, following criminal convictions, the FTC commenced an investigation and attempted to inspect and copy grand jury materials pursuant to the judicial proceeding exception. The FTC asserted that its ability to certify the "facts" of its investigation to the Attorney General rendered disclosure preliminary to a judicial proceeding. 309 F.2d at 442-43. The court rejected the FTC's argument on the ground that it was seeking an impermissible "private disclosure in aid of an administrative investigation . . . ." *Id.*, at 443-44. Since there was no proceeding then pending and it was possible that none would result, the court held that disclosure was not preliminary to or in connection with a judicial proceeding as intended by Rule 6(e). *Id.* IRS in the present case is similarly seeking grand jury materials in "aid of an administrative investigation" for which disclosure is improper.

In a case strikingly similar to the present one, the Fifth Circuit denied disclosure of grand jury documents and transcripts to an administrative agency, the Federal Energy Regulatory Commission (FERC), where a judicial proceeding following administrative action was only a possibility. *In re J. Ray McDermott & Co.*, 622 F.2d 166 (5th Cir. 1980). In *McDermott*, the FERC declined to exercise its own discovery powers, and instead filed a petition for disclosure of grand jury materials. Despite the statutory authority of the Natural Gas Act, 15 U.S.C. §717 *et seq.*, permitting the FERC to subpoena witnesses, to compel the production of documents and to seek injunctive relief in federal district court, the FERC failed to initiate any such actions and chose instead to "rely on disclosed grand jury materials to save time and money." 622 F.2d at 171. The court expressly noted that the mere existence of those statutory powers "does not transform FERC's *desire* to *investigate* into something 'preliminary to or in connection with a judicial proceeding.'" *Id.* (emphasis supplied). The Fifth Circuit thus rejected the FERC's petition, observing that the possibility of a judicial proceeding was "remote". *Id.*[12]

The fact that IRS refuses to use any of its broad arsenal of investigative tools for discovery of tax deficiencies negates the government's claim that disclosure here is preliminarily to a judicial proceeding and, accordingly, precludes disclosure to IRS. *See generally, Miller, supra,* 687 F.2d at 1092 n.17.

Two recent district court decisions, *United States v. Young,* 494 F.Supp. 57 (E.D. Tex. 1980) and *In re Grand Jury Matter,* 495 F.Supp. 127 (E.D. Pa. 1980), applied a similar analysis and denied disclosure to administrative agencies under Rule 6(e)(3)(C)(i).

In *Young* the government requested disclosure of grand jury transcripts to the Texas State Board of Medical Examiners (the "Board") for a license revocation proceeding. The court relied upon *Douglas Oil* to require the government to demonstrate that disclosure would "avoid a possible injustice in another judicial proceeding." 494 F.Supp. at 59 (quoting *Douglas Oil*, 441 U.S. at 222). The court interpreted the exception under Rule 6(e)(3)(C)(i) to require more than merely a showing of "some relationship between a non-judicial proceeding and a future judicial proceeding." 494 F.Supp. at 60. The court instructed that the phrase "preliminarily to or in connection with a judicial proceeding" "should, at the least, mean that requested grand jury material will be used in preparation for a judicial proceeding that is *more than a remote potentiality*." *Id.*, at 60 (emphasis supplied). Accordingly, the failure of the Board to commence the procedure which might ultimately lead to a judicial proceeding compelled the court to deny disclosure. *Accord*, *In re Grand Jury Matter*, *supra*.

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[12] The government attempts to distinguish *McDermott* on the mistaken basis that the administrative proceeding was complete in itself. (Gov. Br. 20 n.16). The FERC's statutory power to bring an action for injunctive relief in any federal district court refutes the attempted distinction. Equally mistaken is the government's same treatment of *United States v. Bates,* 627 F.2d 340 (D.C. Cir. 1980) (disclosure denied to Federal Maritime Commission under Rule 6(e)(3)(C)(i) for administrative hearing into possible violations of the Shipping Act, 46 U.S.C. §814, which is subject to review in the federal district courts under 46 U.S.C. §830); *In re Grand Jury Proceedings, supra,* pp. 20-21; and *Bradley v. Fairfax,* 634 F.2d 1126 (8th Cir. 1980) (disclosure of grand jury materials to U.S. Parole Commission for a parole revocation hearing subject to collateral review in federal courts was not permitted under Rule 6(e)(3)(C)(i), but upheld as harmless error since not prejudicial). All of the administrative procedures in those cases had a common capability of litigation in the federal courts but were found not to be preliminary to a judicial proceeding.

This persuasive line of authority confirms that grand jury secrecy may not be eliminated for the embryonic, speculative and uncertain general need of IRS in aid of its administrative procedures.

D. The Cases Relied On By The Government Unreasonably Expand Rule 6(e)(3)(C)(i) Into A Rule For Automatic Disclosure.

The government places undue reliance on *In re Judge Elmo B. Hunter's Special Grand Jury*, 667 F.2d 724 (8th Cir. 1981) ("*Hunter*"). The unsound reasoning of the cases cited in *Hunter* would inevitably lead to complete emasculation of the essential rule of grand jury secrecy and subversion of the grand jury system. The *ex parte Hunter* decision was made without the benefit of adversary process which is so vital to our judicial system. In *Hunter* two of the three subjects of the tax investigation had been indicted for and convicted of filing false income tax returns. The tax case against those taxpayers had advanced to such a degree that the supervising IRS agent was able to submit an affidavit attesting specifically to the alleged under-reported income of each.

667 F.2d at 728. Further, the district court made a specific finding of particularized need which the Eighth Circuit affirmed. 667 F.2d at 725 n. 2, 728. Although the particularized need criterion is a separate condition for disclosure (*Procter & Gamble*, 356 U.S. at 682), its consideration is necessarily intertwined with the statutory requirement for disclosure of Rule 6(e)(3)(C)(i). Thus, the finding of particularized need in *Hunter* significantly influenced the Eighth Circuit's decision to permit disclosure of the grand jury materials pursuant to Rule 6(e).

The factual setting in *Baggot* stands in stark contrast to *Hunter*. No charges of criminal tax violations were made against Respondent, no deficiency has been assessed and the government did not make a particularized showing of need to justify breaching grand jury secrecy. At this premature juncture it is disingenuous for the government to claim that disclosure here is "preliminarily to" a judicial proceeding.

The *Hunter* court incorrectly relied upon *In re Grand Jury Subpoenas, April 1978, At Baltimore*, 581 F.2d 1103 (4th Cir. 1978) and *In re December 1974 Term Grand Jury Investigation*, 449 F.Supp. 743 (D. Md. 1978). *In re Grand Jury Subpoenas, April 1978, At Baltimore*, is clearly inapposite to the question presented here. In that case the court was not called upon to rule on a Rule 6(e) disclosure motion. A writ of mandamus was brought to obtain an evidentiary hearing regarding allegations of grand jury abuse and to quash grand jury subpoenas. The court noted that mandamus was a drastic remedy and affirmed the decision of the district court refusing to hold a hearing. Disclosure "preliminarily to" a judicial proceeding under Rule 6(e) was not an issue before the court.

The decision in *In re December 1974 Term Grand Jury Investigation* erroneously characterized the quintessential portion of *Procter & Gamble* regarding "particularized need" as *dicta.* 449 F.Supp. at 748. The Maryland district court permitted disclosure of grand jury materials under Rule 6(e) without addressing the issue of whether the disclosure was "preliminarily to" a judicial proceeding. The court's decision was based upon the erroneous assumption that the need for grand jury secrecy disappears after its investigation has ended. *See contra, Douglas Oil,* 441 U.S. at 222. The Maryland case was decided prior to *Douglas Oil* and has been disapproved by many courts. *See, e.g., United States v. Bates,* 627 F.2d 349, 351 n. 1 (D.C. Cir. 1980); *General Motors, supra,* 506 F.Supp. at 1178; *In re Proceedings before the Federal Grand Jury for the District of Nevada,* 487 F.Supp. 1098, 1100 n. 2 (D. Nev. 1980).

The *Hunter* court also cited *In re Grand Jury,* 583 F.2d 128 (5th Cir. 1978) for a proposition in direct contravention to the widely recognized principle that grand jury secrecy may not be sacrificed for the reasons of expediency or cost. *Procter & Gamble,* 356 U.S. at 682; *United States v. Sobotka,* 623 F.2d 764, 768 (2d Cir. 1980). Equally unpersuasive is *Hunter's* citation of *In re Grand Jury Investigation No. 78-184,* 642 F.2d 1184 (9th Cir. 1981) (*Sells*), *cert. granted,* ..... U.S. ......, 102 S.Ct. 2034 (1982) (No. 81-1032). *Sells* involves actual litigation under the False Claims Act, 31 U.S.C. §§ 231-235 (1976), and provides no support for the *Hunter* court's decision.

The government and *Hunter* place unjustified reliance on a *sui generis* group of quasi-judicial disciplinary cases which incorporated the excessively lenient "designed to culminate" test espoused by the government (Gov. Br. 19): *Doe v. Rosenberry,* 255 F.2d 118 (2d Cir. 1958) ("*Doe*"); *Special February 1971 Grand Jury v. Conlisk,* 490 F.2d 894 (7th Cir. 1973) ("*Conlisk*"); *In the Matter of Disclosure of Testimony Before the Grand Jury,* 580 F.2d 281 (8th Cir. 1978) ("*Troia*"); and *United States v.*

Sobotka, 623 F.2d 764 (2d Cir. 1980). Unlike the present case, the facts of those cases arose in the context of a developed controversy between a disciplinary board and its subject. The disciplinary cases involved requests for grand jury materials during quasi-judicial proceedings *in esse* where significant procedural rights had attached. In the present case there is at most only a "proposed investigation".

The distinctive nature of disciplinary proceedings was noted by the Court in *United States v. Bates*, 627 F.2d 349, 351 (D.C. Cir. 1980). Distinguishing *Doe* and *Troia*, the court stated:

> [D]isciplinary proceedings of lawyers, where bar committees act as an arm of the court, are a function which has been assigned to the judiciary from time immemorial. It is not only preliminary to a judicial proceeding, it is *part* of a judicial proceeding.

627 F.2d at 351 (emphasis in original). *See also, In re Grand Jury Investigation of Uranium Industry*, 1979-2 Trade Cases (CCH) §62,798 (D.D.C. 1979).

One panel of the Eighth Circuit has expressed "grave doubts" concerning the *Troia* court's use of the "designed to culminate" test because its "expansive reading of Fed. R. Crim. P. 6 . . . invites indiscriminate disclosure of grand jury materials to a wide variety of agencies whose decisions are subject to judicial review." *Bradley v. Fairfax*, 634 F.2d 1126, 1129 n. 6 (8th Cir. 1980). As the *Bradley* court accurately recognized, the mere fact that there is a form of judicial review which is contemplated somewhere at the end of an administrative pathway does not entitle an administrative agency to consider its administrative investigations "preliminarily to" a judicial proceeding. This is particularly true in the context of IRS civil tax proceedings where the taxpayer has numerous options to conclude the administrative proceedings and the actual likelihood of litigation is *de minimis*.

The overly broad "designed to culminate" interpretation of Rule 6(e)(3)(C)(i) should not be extended to purely administrative type investigations. The impact upon the grand jury system from expansion of the "designed to culminate" view would be devastating because "any administrative action could lead to a judicial proceeding, and could thus be said to be preliminary to such a proceeding." *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv.L.Rev. 1227, 1317 (1979).

The government's suggested interpretation, carried to its logical conclusion, would enable every administrative agency to obtain secret grand jury materials on the ground that their administrative actions were "designed to culminate" in a judicial proceeding. In addition to specific statutory enactments which could be construed as "designed to culminate", the Administrative Procedure Act, 5 U.S.C. §701, *et seq.*, ("APA"), "embodies the basic presumption of judicial review" of agency action by an aggrieved person which "will not be cut off unless there is persuasive reason to believe that [nonreviewability] was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). In light of the congressional intent to cover a "broad spectrum of administrative action" and the "hospitable" interpretation given to the APA's "generous review provisions", it is not unreasonable to envision the APA as a mechanism for administrative agencies to regularly breach the protective veil of secrecy under the guise of the government's "designed to culminate" standard. *Id.*, at 140-41. Application of such an expansive interpretation of Rule 6(e)(3)(C)(i) in the context of the present embryonic administrative matter would fatally undermine the grand jury function.

The government draws an implausible analogy between criminal investigations and civil tax investigations to support its specious claim that civil tax investigations "*as a class* are preliminary to judicial proceedings" regardless of whether such investigations disclose that additional taxes are due (Gov. Br. 26). That argument, however, is an extension of its reliance upon the distinguishable quasi-judicial disciplinary cases, where an actual case or controversy had ripened into a proceeding *in esse*. As shown above, civil tax investigations rarely result in judicial proceedings. There is a significant distinction between the "prosecutorial discretion to refrain ultimately from making a charge" in a criminal case and the plethora of ifs and probabilities which befall a civil tax investigation. *See, In re Grand Jury Matter*, 682 F.2d 61, 65 (3d Cir. 1982) ("*Catania*"). The government is seeking to give carte blanche to IRS by expanding the limited exception of Rule 6(e) into a *per se* rule of disclosure for every civil tax investigation after the grand jury has terminated. That intolerable result would convert the grand jury process into a tool for IRS civil discovery thereby "flouting the policy of the law." *Procter & Gamble*, 356 U.S. at 683. Respondent submits that the government's position would make a mockery of the statutory safeguard of the judicial proceeding exception and would precipitate a significant abrogation of grand jury secrecy. Accordingly, this Court should affirm the court of appeals' decision denying disclosure to IRS for its proposed civil tax investigation.

II.

DISCLOSURE IS BARRED BY THE GOVERNMENT'S FAILURE TO SATISFY THE PARTICULARIZED NEED STANDARD PRONOUNCED BY THIS COURT.

The government's decided failure to demonstrate particularized need bars disclosure of the requested grand jury materials. The longstanding principle of grand jury secrecy is safeguarded by the well-recognized prerequisite standard for disclosure: particularized need. *Procter & Gamble*, 356 U.S. at 682. The record in this case is utterly devoid of any particularized showing of need by the government for disclosure. Instead, the government attempts to skirt around the issue by claiming that the court of appeals never addressed that second criterion for removing the protective veil of secrecy (Pet. 10 n. 6; Gov. Br. 8 n. 7). Disclosure here is improper regardless of the interpretation of Rule 6(e)(3)(C)(i) because of the lack of particularized need. Further, the government's brief errantly fails to address the particularized need issue but refers, instead, to its argument in *Sells* which urges a diminished standard of disclosure based upon a mere "rationally related" test. (Gov. Br. 14 n. 11, 18 n. 12). The government's separation of the two criteria for disclosure is a transparent attempt to disguise its failure to demonstrate particularized and compelling need. The combined effect of the government's position in *Baggot* and *Sells* would virtually eliminate judicial discretion concerning grand jury disclosure. The Court should consider both criteria for disclosure in this case.

A. The Court Of Appeals Applied The Correct Standard Of Particularized Need And Properly Maintained Grand Jury Secrecy.

Requests for disclosure of grand jury materials under 6(e)(3)(C)(i) must satisfy both the particularized need standard articulated by this Court and the limited "preliminarily to" exception. Contrary to the government's assertions, the court of appeals did address the particularized need standard. In its brief before that court, the government unsuccessfully argued it need only show that grand jury materials were "rationally related" to civil matters under investigation and did not have to demonstrate particularized need. The *Baggot* court rejected modification of the standard and embraced the compelling need test established in *Procter & Gamble* (Pet. App. 10a & nn. 8 & 9; 18a; 30a). Neither Rule 6(e) nor decisions of this Court condones the standard urged by the government or confers a special status on the government which mandates disclosure.

The decisions of this Court fully support the continuation of secrecy. The test for disclosure of grand jury materials for civil proceedings was established in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), which held that grand jury transcripts would not be disclosed to a defendant in a civil antitrust action because grand jury secrecy "must not be broken except where there is compelling necessity" which "must be shown with particularity". 356 U.S. at 682. That "particularized and compelling need" test has been retained in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) and in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 221-23 (1979).

Particularized need is still the controlling standard for breaching grand jury secrecy. Contrary to the government's assertion in its *Sells* brief (*Sells* Gov. Br. 43 n. 41), the particularized need standard from *Procter & Gamble* was expressly sanctioned by Justice Powell's opinion in *Douglas Oil*, 441 U.S. at 221-24. Justice Powell articulated a three prong test for satisfying the particularized need standard for disclosure:

> From *Procter & Gamble* and *Dennis* emerges the standard for determining when the traditional secrecy of the grand jury may be broken: Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

441 U.S. at 221-22.

Douglas Oil further established that grand jury secrecy is not eliminated because a grand jury investigation has ended. Therefore, "courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries." 441 U.S. at 222. *Procter & Gamble* and *Douglas Oil* warn that disclosure of grand jury materials might discourage free and untrammeled disclosures by persons who have information with respect to crimes. *Procter & Gamble*, 356 U.S. at 681-82 n. 6 (1958); *Douglas Oil*, 441 U.S. at 219-23 (1979).[13] Only where the need for disclosure is compelling and concrete will the interest in grand jury secrecy be overcome.

1. The Request For Disclosure Fails To Satisfy The Requirements Of *Douglas Oil*.

The government's alleged purpose for seeking disclosure does not outweigh the time-honored principle of grand jury secrecy. None of the three elements of the *Douglas Oil* test for disclosure was satisfied by the government. The government's failure to satisfy *Douglas Oil* precludes access to grand jury materials regardless of the interpretation of Rule 6(e)(3)(C)(i).

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[13] *See, Administrative Agency Access to Grand Jury Materials*, 75 Columbia L.Rev. 162, 182-84 (1975).

a. The Grand Jury Materials Are Not Sought To "Avoid A Possible Injustice In Another Judicial Proceeding".

In light of the failure of IRS to initiate an investigation of or assess a tax deficiency against Respondent, disclosure is too attenuated from any judicial proceeding to be "needed to avoid a possible injustice in another judicial proceeding." *Douglas Oil*, 441 U.S. at 222. See Respondent's argument above, pp. 9-18. The government concedes that IRS intends to use the requested materials for a proposed administrative investigation, not to prevent injustice in another judicial proceeding. As the former Fifth Circuit declared in *In re Disclosure of Evidence*, 650 F.2d 599, 601 (former 5th Cir. 1981):

> Without a showing that disclosure is necessary to avoid possible injustice in another judicial proceeding, the moving party cannot establish particularized need.

There is no investigation or judicial proceeding now pending and it is possible that none may occur. The significant interests surrounding grand jury secrecy may not be sacrificed on the basis of such an unsubstantiated need.

b. The Extensive Powers Of IRS To Compel Discovery Belie Its Need For Grand Jury Materials.

The government has failed to establish that "the need for disclosure is greater than the need for continued secrecy." *Douglas Oil*, 441 U.S. at 222. Rather, the government has only claimed a general need for the materials to assist IRS in its proposed administrative investigation of Respondent's possible tax liability.

The motion for disclosure was spawned by an unparticularized general discovery request. In his letter to the United States Attorney, the Chief of the IRS Examination Division wrote:

> I am requesting that a Rule 6(E) [sic] order for civil purposes be obtained for 1975 due to the following reasons: (1) to obtain the information and documents which would be needed to determine the correct tax liability of Baggot for 1975 . . . .

(Br. Opp. App. 4a). Setting aside the enormous potential for abuse represented by the letter, the primary deficiency of the government's request is that IRS possesses the power to obtain the information necessary to determine Respondent's possible tax liability. *See, infra*, pp. 50-52. Instead, IRS has selected to feed off the grand jury process to obtain information. The court of appeals specifically recognized that the government had "alternative civil means" to accomplish its purpose and "the failure of civil process has not been demonstrated in the record." (Pet. App. 11a-12a). *See, In re Disclosure of Evidence*, 650 F.2d 599, 602 (former 5th Cir. 1981).

IRS has no specific need for the materials in any reasonably foreseeable judicial proceeding which outweighs the significant need for continued secrecy. Access to grand jury information cannot be had merely for the convenience of IRS's proposed civil tax investigation. *See, In re Grand Jury Matter*, 682 F.2d 61, 66 (3d Cir. 1982) ("*Catania*"). The general need asserted for the materials is not greater than the need for continued secrecy. *Douglas Oil*, 444 U.S. at 222.

c. The Request For Disclosure Was Overly Broad And Unparticularized.

Disclosure of grand jury materials is sought in response to an overly broad and unparticularized request embodied in the letter written by the Chief of the Examination Division. (Br. Opp. App. 3a-4a). That letter's sweeping request for grand jury materials in effect says, "cull through all your grand jury materials Mr. United States Attorney and send us anything we might need to determine if there is a tax liability" and is the same type of general, unparticularized request that was rejected by this Court in *Procter & Gamble*. The unparticularized nature of the request is exacerbated by the general purpose for which disclosure is sought. Since, "a judicial proceeding is only a possibility . . . proper limitation is practically foreclosed." *In re J. Ray McDermott & Co.*, 622 F.2d 166, 172 (5th Cir. 1980). Thus, the government's request for disclosure arises in the context of IRS's desire to utilize the grand jury materials in a general manner for a proposed investigation and runs afoul of *Douglas Oil*'s third requirement that the request for disclosure be "structured to cover only material so needed." 441 U.S. at 222.

Failure to satisfy any one of the three elements of the *Douglas Oil* test would bar disclosure. Here, the government has failed all three, thereby precluding access to the grand jury materials.

2. Authoritative Decisions Strongly Reject The Government's Suggested Test For Disclosure.

There is no question that the government has not and cannot demonstrate a particularized and compelling need. In light of the indisposition of IRS to make use of its powerful investigative tools and the labyrinthine administrative procedures which tend to preclude litigation, it is not surprising that the government argues for a drastically reduced standard for disclosure. (*Sells* Gov. Br. 45). Fortunately, the overwhelming weight of authority soundly rejects adoption of the "rational relation" standard. Courts have cautiously guarded grand jury independence and secrecy by adhering to the particularized need standard even though the government sought disclosure. Significantly, no authoritative case decided since *Douglas Oil* has advocated a double standard for disclosure between government and private parties.

Recently, in *Miller, supra,* the Seventh Circuit expressly rejected the government's suggested standard:

> A showing of rational relationship between the materials and the civil proceeding may explain the government's desire for disclosure, but does not determine the degree of necessity. *Sells,* 642 F.2d at 1192. We prefer a standard which requires all parties to establish particularized need and which affords governmental agencies no special treatment.

687 F.2d at 1091.[14] *Accord, In re Illinois Petition to Inspect and Copy Grand Jury Materials, Appeal of State of Illinois,* 659 F.2d 800, 804 (7th Cir. 1981), *cert. granted,* ..... U.S. ....., 102 S.Ct. 1708 (1982) (No. 81-1114) (State's attempt to distinguish particularized need cases on basis of private parties analysis rejected by court).

The Third Circuit recently denied disclosure of grand jury materials to a state district attorney for use in a planned state investigation by applying the particularized need standard. *In re Grand Jury Matter,* 682 F.2d 61 (3d Cir. 1982). The Fifth Circuit is in accord with cases applying the particularized need standard to government and private requests. *In re Disclosure of Evidence,* 650 F.2d 599 (former 5th Cir. 1981); *cf. State of Texas v. United States Steel Corp.,* 546 F.2d 626 (5th Cir. 1977). The Eighth Circuit also adheres to the prerequisite showing of particularized need for disclosure to government agencies. *Bradley v. Fairfax,* 634 F.2d 1126, 1129-30 (8th Cir. 1980); *Cf. Troia, supra,* 580 F.2d 281, at 286.

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[14] It is significant that in *Baggot,* unlike *Sells,* there is no specific "civil proceeding" to which any rational relation could be made under the proposed standard. *McDermott, supra,* 622 F.2d at 172. As stated above, disclosure based upon a mere rational relation between the materials and an administrative investigation is clearly violative of the principle that grand jury secrecy may not be breached for reasons of expediency or cost.

In the Tax Court the particularized need standard was enforced against IRS in *Cohen v. Commissioner*, 42 T.C.M. (CCH) 312, 318 n.5 (1981).

The weight of authority in federal district courts upholds the particularized need standard against all parties seeking disclosure. *See, General Motors, supra.* 506 F. Supp. 1174; *In re U.S. Order Pursuant to the Provisions of Rule 6(e)*, 505 F.Supp. 25 (W.D. Pa. 1980); *In re John Doe*, 537 F.Supp. 1038, 1042 (D.R.I. 1982); *United States v. Young*, 494 F.Supp. 57, 62 (E.D. Tex. 1980); *In re Grand Jury Matter*, 516 F. Supp. 27, 28 (E.D. Pa. 1981); *In re Grand Jury, September 20, 21, 22 and 25, 1967*, 82 F.R.D. 70, 73 (N.D. W.Va. 1979); and *In re Grand Jury Investigation*, 414 F.Supp. 74 (S.D. N.Y. 1976).

B. The Government Urges Inconsistent Arguments In *Baggot* And *Sells*.

The government seeks to allay fears of grand jury abuse generated by a liberal disclosure policy by assuring the Court that under *Douglas Oil* there cannot be disclosure unless "its need for the information outweighs the public interest in continued grand jury secrecy". (Gov. Br. 17, 18).

The integrity of the government's ostensible concern for grand jury abuse is suspect in light of its inconsistent positions in *Baggot* and *Sells* regarding *Douglas Oil*. At page 18 of its brief in this case, the government advocates enforcement of the *Douglas Oil* test in an attempt to mollify the legitimate fear of grand jury abuse raised by the court of appeals. In its *Sells* brief, however, the government disparagingly refers to the Ninth Circuit's concern for abuse as a "cavalier assumption" and strongly urges that the same *Douglas Oil* test be confined to *private parties*, thereby permitting disclosure to the government upon less than a showing of particularized need, *i.e.*, "rational relationship". (*Sells* Gov. Br. 35, 43, 45). It is disingenuous for the government to rely upon the protective requirements of *Douglas Oil* to justify a breach of grand jury secrecy in the present case and at the same time advocate a contradictory argument in *Sells* which directly impacts upon the *Baggot* determination.[15]

The government's position in *Sells* does not comport with the established needs for continued secrecy. An important reason for requiring particularized need is to prevent grand jury abuse. "[T]he application of the particularized need requirement to *all requesting parties* is a safeguard for the grand jury because it tends to prevent it from being used as an instrument for exploration in aid of civil proceedings." *Miller, supra*, 687 F.2d at 1092 [emphasis supplied; citing *In re April 1956 Term Grand Jury*, 239 F.2d 263, 271-72 (7th Cir. 1956)]. *See also, In re Grand Jury Investigation*, 414 F.Supp. 74, 76 (S.D. N.Y. 1976). Thus, although a district court is infused with considerable discretion to respond to Rule 6(e) requests, *Douglas Oil*, 441 U.S. at 228, it is permitted to exercise its discretion in favor of disclosure only where a particularized need exists which outweighs the policy of secrecy. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959). The decision of the court of appeals correctly determined that the government's request for disclosure was not sufficient to interfere with grand jury secrecy.

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[15] As the government's briefs illustrate, an unassociated analysis of the particularized need standard and the judicial proceeding exception is not only misleading, but deprives the Court of the ramifications of both government requests for disclosure on the grand jury system.

III.

THE LEGISLATIVE HISTORY OF RULE 6(e) DOES NOT SUPPORT DISCLOSURE OF GRAND JURY MATERIALS FOR CIVIL TAX INVESTIGATIONS.

The government's argument that Congress intended secret grand jury materials be disclosed for use in civil tax investigations under the "preliminarily to . . . a judicial proceeding" exception to Rule 6(e) is erroneous.

Rule 6(e), as originally adopted in 1946, provided, in part, for disclosure of matters occurring before the grand jury only:

> [W]hen so directed by the court preliminarily to or in connection with a judicial proceeding . . . .[16]

Those words have survived unchanged by Congress and presently appear as the Rule 6(e)(3)(C)(i) exception involved here.

The 1946 Advisory Committee Notes accompanying Rule 6(e) explain that 6(e) "continues the traditional practice of secrecy . . . except when the court permits a disclosure . . . ." 18 U.S.C. App. at 1411.[17] The drafters intended to continue traditional practices regarding disclosure of grand jury materials and did not intend the liberal disclosure the government seeks. Respondent is not aware of any practices prior to 1946 that disclosed grand jury materials for use in civil tax *investigations.*

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[16] The text of Rule 6(e) as promulgated in 1946 is set forth in Appendix, 6a, *infra*.

[17] In support of its statement, the Advisory Committee cited *Schmidt v. United States*, 115 F.2d 394 (6th Cir. 1940); *United States v. American Medical Association*, 26 F.Supp. 429 (D.D.C. 1939) and *Atwell v. United States*, 162 F. 97 (4th Cir. 1908). None of those cases support the government's contention that the legislative history of Rule 6(e) authorizes disclosure of grand jury materials for use in a civil tax investigation. Indeed, none of those cases address the issue of disclosure to an administrative agency. It is noteworthy that all of those cases involved disclosure in an *existing* judicial proceeding and discretionary power of the court to order disclosure.

Likewise, the legislative history of the 1977 amendments to Rule 6(e) shows that Congress intended no change regarding disclosure under 6(e)(3)(C)(i). The "preliminarily to" clause of 6(e) was not changed by the 1977 amendments. The plain words of the amendments reveal that Rule 6(e) was amended primarily to allow disclosure to government personnel to assist federal prosecutors in enforcing federal criminal law, 6(e)(3)(A)(ii). They further provided that the person to whom such disclosure was made is prohibited from using the disclosed material "for any other purpose . . . other than to enforce federal criminal law," 6(e)(3)(B), under pain of contempt, 6(e)(2). Lastly, the amendments required that the names of all personnel who received disclosure be provided to the district court, 6(e)(3)(B). Thus, the express words of the 1977 amendments to Rule 6(e) demonstrate congressional intent that strict standards govern disclosure of grand jury materials and Congress did not provide for access by an administrative agency of those secret materials for use in civil investigations.

The legislative history of the 1977 amendments rejects the government argument that Congress intended to grant easy access to grand jury materials for use in civil tax investigations. Strict secrecy was contemplated:

> [A] government agent receiving grand jury information from an attorney for the government . . . is not free to share such information within the agency which directly employs him, even though it may be useful and relevant to the mission of that agency.

123 Cong.Rec. 25193-25196 (1977).[18] Representative Wiggins also cautioned that a government attorney could

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[18] Remarks of Representative Charles E. Wiggins in support of 1977 Amendments to Rule 6(e). Congressman Wiggins further noted:

(Footnote continued on following page)

not turn over grand jury materials for civil use to a governmental agency until "successfully seeking an order of the court." *Id.*

All hearings on the 1977 amendments were held by the Subcommittee on Criminal Justice of the House Judiciary Committee. The Subcommittee heard Professor Wayne LaFave, who appeared on behalf of the Advisory Committee on Criminal Rules of the Judicial Conference, explain the purposes of the 1977 amendments:

> I think the one thing that needs to be stressed about this particular change is that it only contemplates the U.S. attorney using these other Government personnel when it is necessary for the U.S. attorney's work. What it does not contemplate at all is the turning over of this information to the other Government agencies themselves. The circumstances in which that can happen are dealt with in another part of rule 6(e) which is not changed at all: namely, the part that says that a court can direct disclosure only preliminary to or in connection with a judicial proceeding.
>
> There is a good bit of case law that has developed as to the meaning of that part of 6(e) and, generally, the cases say that the grand jury material cannot be turned over to an administrative agency for purely administrative proceedings, because that is not a judicial proceeding. But there are occasions when an administrative agency can show sufficient need with respect to pending judicial proceedings.

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[18] *continued*

Grand juries cannot be used for purposes other than the investigation of violations of the criminal law. However, the fact that a civil investigation is ongoing should in no way impede initiating a grand jury investigation. Indeed, an IRS civil audit could well lead to evidence of criminal tax fraud. Both investigations must then go forward. *However, grand jury information must not flow to the civil investigation* although the converse is not necessary or desirable. *Id.* (emphasis supplied).

> The point is that no change is being made in that part of the rule, so the barriers to administrative agencies getting their hands on this material still exist.

Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess. 86 (1977) ("House hearings").

When questioned by Representative Mann concerning the likelihood that under the proposed amendments government agencies would routinely gain access to grand jury materials, Professor LaFave stated:

> The cases that I am familiar with generally have required a strong showing by the administrative agency of a need for the material, *that there is no way they could acquire comparable evidence that it is critical to their undertaking, and that is going to be used in connection with a judicial proceeding.* If the administrative agency wants it for purely administrative purposes to use in an administrative hearing, this does not come within the rule.
>
> So, the answer in the situation would be that they cannot obtain it at all.

Id. at 92-93 (emphasis supplied).[19]

Several witnesses at the House hearings opposed the proposed amendments to 6(e) because of their concern that disclosure to agency personnel assisting the grand jury would inevitably lead to disclosure of grand jury materials for agency use. Various proposals were made to prevent such leakage.[20]

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[19] The government seeks solace in the fact that Professor LaFave answered "yes" when asked if a "tax hearing" was considered a judicial proceeding (Gov. Br. 28 n. 24); however, there is no comfort in that answer. Clearly, the proposed civil tax investigation of Mr. Baggot does not rise to the level of a "tax hearing." At this stage, there is nothing to be heard.

After three days of hearings the House rejected the original proposed amendment to 6(e) because it could have been construed to allow government agency personnel to use grand jury material in civil cases and "this would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them." Kirkland, *Administrative Agency Access to Grand Jury Material Under Amended Rule 6(e)*, 29 Case Western L. Rev. 295, 314 (1978).

The Senate Judiciary Committee did not hold hearings on the proposed amendments, but relied on the House hearings. The Senate Committee amended the 6(e) proposals by inserting provisions that became the present Rule 6(e)(3)(A)(ii), 6(e)(3)(B) and the contempt portion of 6(e)(2). These provisions provided for grand jury assistance in the enforcement of federal criminal law as outlined above. Significantly, the Senate Committee left unchanged the "preliminarily to" language that is now 6(e)(3)(C)(i).

The Senate Report stated that grand jury evidence could be used for civil law enforcement purposes only if a court order authorizing disclosure was obtained under 6(e)(3)(C)(i), noting that the necessity for a court order should "allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws . . . ."[21]

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[20] *Id.*, at 27-28 (Statement of Terry P. Segal and Gerald Feffer); 33-34, 50 (testimony and statement of Judge Edward R. Becker); 124 (statement of David Epstein); 148, 160 (testimony and statement of Bernard J. Nussbaum); 194-95 (testimony of Prof. Leon Friedman); 222, 229 (testimony and statement of Prof. Melvin Lewis).

[21] S.Rep. No. 95-354, 95th Cong., 1st Sess. reprinted in [1977] U.S. Code Cong. & Ad. News, p. 531 ("Senate Report").

The Senate then stated that the basis for a court's refusal to issue an order under 6(e)(3)(C)(i) for disclosure in a noncriminal proceeding "should be no more restrictive than is the case today under prevailing court decisions" and cited *Procter & Gamble*, 356 U.S. at 683-84 and *Robert Hawthorne, Inc. v. Director of Internal Revenue Service*, 406 F.Supp. 1098 (E.D. Pa. 1976). Senate Report, p. 532.

Procter & Gamble, of course, embodies the particularized need standard which was embraced by the court of appeals. The government assiduously avoids mentioning the particularized need test established by this Court in *Procter & Gamble* and erroneously argues that (1) *Procter & Gamble* deals with disclosure to private parties, therefore, its test is not applicable to the government; and (2) *Procter & Gamble* approved the government's use of grand jury materials for civil use (Gov. Br. 29). That argument is not supported by *Procter & Gamble* or relevant legislative history.

As stated, the 1977 amendments dealt entirely with assistance to the prosecutor by "government personnel." The primary concern during the House hearings and in the Senate Report was the misuse by and leakage back to governmental agencies of grand jury materials by the assisting personnel. In light of that extensive concern, the Senate Report citation to the particularized need test of *Procter & Gamble* demonstrates Congress intended that standard to apply to requests by the government for disclosure. Although *Procter & Gamble* did not directly concern the propriety of disclosure to the government, the concurring opinion by Justice Whittaker specifically advocated compliance with the particularized need standard for civil disclosure requests by the government. *Procter & Gamble*, 356 U.S. at 684-85. Thus, the Senate Report's citation to *Procter & Gamble* shows congressional approval of the particularized need standard and its application to government requests for disclosure.

Likewise, the Senate Report citation to *Hawthorne, supra*, does not support the government's argument. The focus of Hawthorne was the providing of technical assistance by IRS personnel to the United States Attorney in a grand jury investigation. The court required grand jury material to "remain at all times under the aegis of attorneys for the government." 406 F. Supp. at 1113. The court carefully noted that IRS made no civil tax use of any of the grand jury records. *Id.* The court further noted that agencies do not have an independent right to disclosure under the "preliminarily to" exception of 6(e). *Id.*, at 1124 n.48. Then the court proceeded to impose a series of exacting controls and requirements on the government (*Id.*, at 1128-30) to insure that grand jury records "will not be utilized by the agency in any independent sense . . . ." *Id.*, at 1128. Further, the court stated when an agency had completed its technical assistance duties, the United States Attorney must file a certification that all grand jury matters "theretofore entrusted to the agency have been returned to the United States Attorney for appropriate disposition." *Id.*, at 1127, 1130. Significantly, the court then held that the role of the agency which had access to grand jury materials was terminated when it completed its work and declared that the "future use of the materials to which it had access will follow as though there had been no access." *Id.*, at 1129. The court specifically noted that the vehicle for access was through a petition for disclosure under the "preliminarily to" exception. *Id.*, at 1129 n.62. Lastly, the court stated that it would *modify* its 6(e) order to comport with the requirements it imposed. *Id.*, at 1129.

Thus, the Senate Report does not condone access to grand jury materials by IRS for purposes of civil investigation as the government claims. The Senate Report clearly embraced the existing standard for disclosure under the "preliminarily to" exception, namely, the particularized need test of *Procter & Gamble*, and further concluded through citation to *Hawthorne* that disclosure for civil use may be granted to an agency like IRS only through the "preliminarily to" exception.[22]

Congress gave the proposed amendments close scrutiny because of its concern over changing a rule that "touch[ed] upon the basic function and operation of the grand jury system." 123 Cong.Rec. 11109 (1977). The fact that Congress did not intend to facilitate access to grand jury materials by IRS for civil purposes through the 1977 amendments is further reinforced by the statements of Representative Mann who explained that there was no intention to change "current practice" with regard to the "preliminarily to" exception. *Id.*, at 25194-25195. Thus, the denial of disclosure was entirely consistent with the legislative history of Rule 6(e).[23]

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[22] It is noteworthy that the *Hawthorne* court made no attempt to justify disclosure to IRS for technical assistance under the "preliminarily to" exception.

[23] Respondent does not dispute the government contention that it has a right to apply for disclosure under the "preliminarily to" exception, however, there is no right to have that petition granted and the court of appeals properly denied the government's application. Additionally, the government hyperbolizes the holding of the Seventh Circuit by suggesting the court held that no civil use "may ever" be made of grand jury materials. The court of appeals' decision is clearly limited to the *Baggot* facts. (Pet.App. 11a).

IV.

THE IRS TAIL SEEKS TO WAG THE GRAND JURY DOG BY HAVING THIS COURT LEGISLATE A SPECIAL EXCEPTION TO 6(e) FOR THE BENEFIT OF IRS.

The government policy arguments for disclosure do violence to the explicit words of Rule 6(e), the express intent of Congress, decisions of this Court, and the historic policy of grand jury secrecy. In its argument, the government places the interest of IRS in assessing taxes above the interest of the grand jury in the effective enforcement of all laws, not just tax laws. The disclosure rule which the government urges would seriously impede the investigative functions of the grand jury. Witnesses who possess relevant information will be less likely to disclose that information and more likely to assert Fifth Amendment rights if the grand jury becomes a conduit to IRS. Thus, the grand jury will be denied information which a witness may fear to share with IRS. If successful, the government will deal a crippling blow to law enforcement while merely providing IRS information which it can readily obtain through its own processes. Disclosure would have this Court exalt the interests of IRS over all other governmental interests. For this reason, the Solicitor's argument is misguided and must be rejected. Sadly, the government attempts to coerce this Court through the threat of limiting IRS assistance to grand juries if the Court does not interpret 6(e) to provide IRS with the grand jury materials it seeks.[24] The interpretation sought would require this Court to legislate a special exception under 6(e) for the benefit of IRS. Legislation is the province of Congress.

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[24] This is akin to the pique of a child who threatens to take his ball and go home if he is not allowed to pitch.

The Solicitor premises his first policy argument on the fact that, since Respondent pled guilty, none of the reasons for maintaining grand jury secrecy are jeopardized. That argument conflicts with the decisions of this Court. In both *Procter & Gamble*, 356 U.S. at 681-82 n.6, and *Douglas Oil*, 441 U.S. at 219 n.10, this Court approved the interests protected by grand jury secrecy:

> (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Those two reasons for secrecy are still viable in this case. *Douglas Oil* held that grand jury secrecy is not eliminated merely because the grand jury has ended its investigations, noting the need to ensure that witnesses will be willing to come forth and testify freely before the grand jury without fear of their testimony being disclosed to outside parties is of cardinal importance to the principles of grand jury secrecy. 441 U.S. at 222. Therefore, "courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries." *Id.* The functioning of future grand juries would certainly be impeded if the disclosure which is sought is granted. The dual functions of future grand juries, criminal and civil, would have the practical effect of drying up sources of grand jury information for fear of disclosure to IRS or other agencies. A witness before the grand jury is encouraged to make free and untrammeled disclosures to that body, because he is secure in the knowledge that his disclosures will be kept secret. That encouragement would vanish and be replaced with a reluctance to make disclosures when the witness is faced with the knowledge that his testimony will be published to administrative agencies.[25] The reluctance to testify would deprive grand juries of needed information and, thus, hinder its legitimate functions to the detriment of the criminal justice system.

If the Court accepts the scheme of disclosure advocated by the government in *Baggot* and *Sells*, the grand jury process will be dealt a mortal blow. The combined effect of decisions favorable to the government in *Baggot* ("preliminarily to") and *Sells* ("rational relationship") would completely emasculate grand jury secrecy. That result will impact severely on the need to "encourage free and untrammeled disclosures" by grand jury witnesses and will also subvert the grand jury into a tool for civil investigations. The enormous potential for subversion and destruction of the grand jury function runs afoul of this Court's steadfast allegiance to grand jury secrecy. The court of appeals astutely recognized the harmful effects that disclosure might have on future grand juries and properly held that the grand jury materials herein require protective secrecy under Rule 6(e).

The validity of the second reason for secrecy to the present case is also approved in *Douglas Oil*, where Justice Powell noted that, although parties had been indicted and pled *nolo contendere*, "under our decisions they nonetheless are legally entitled to protection, as there may have been accusations made for which no indictment was returned." 441 U.S. at 218 n.8.

Contrary to the broad interpretation favoring disclosure which the government seeks, this Court has consistently adhered to a narrower standard requiring that the need for grand jury materials be shown "with particularity" so that "the secrecy of the proceedings [may] be lifted discretely and limitedly." *Procter & Gamble*, 356 U.S. at 683; *Pittsburgh Plate Glass*, 360 U.S. at 400 and *Douglas Oil*, 441 U.S. at 221-22. The court of appeals correctly held that no such compelling showing was made by the government (Pet.App. 10a, 18a). Thus, the court of appeals, fully cognizant of the compelling interests mandating grand jury secrecy, properly held that "the policies favoring grand jury secrecy in most instances must still be given due weight." (Pet.App. 29a).

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[25] As the amicus, General Motors Corporation, noted in its brief (p. 23, n.14) "careful counsel" would not advise their clients that their grand jury testimony will be kept secret, but would be compelled to advise of disclosure to administrative agencies.

If the Court were to dictate the broad policy for disclosure that the government seeks, that interpretation would be contrary to the express intent of Congress as demonstrated by the legislative history of the 1977 amendment. As originally promulgated, that amendment would have provided for disclosure to governmental agencies "to assist the attorneys for the government in the performance of their duties." H.R.Rep. No. 95-195, 95th Cong., 1st Sess. 3 (1977). The House rejected the proposed amendment because:

> There was concern that it would permit too broad an exception to the rule of keeping grand jury proceedings secret. It was feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case. This would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them.

Id., at 4. Favoring rejection and concerned about undermining grand jury secrecy, Representative Holtzman stated, "In my judgment, grand jury proceedings ought not to be disclosed to other governmental agencies without strict safeguards." 123 Cong.Rec. 11111 (1977).

Those safeguards were enacted in the Senate version of the amendments which were ultimately adopted. They provided for agency assistance to the attorney for the government in connection with his "duty to enforce federal criminal law", 6(e)(3)(A)(ii), and guarded against unauthorized disclosure, 6(e)(3)(B), through contempt sanctions, 6(e)(2). Speaking in support of the Senate version, Representative Mann noted that, since the "preliminarily to" exception was not involved in the proposed amendment to 6(e), there was no intention to change established practice regarding that exception. *Id.*, at 25194-25195. Thus, Congress did not intend the liberal disclosure policy under 6(e)(3)(C)(i) opted for by the government.

The government also argues that disclosure to IRS is hardly any disclosure at all because the information will be restricted to that agency's use and IRS is prohibited by statute (26 U.S.C. §6103) from disclosing information gained during an income tax investigation. The suggested confidentiality is at best illusory. Disclosed grand jury materials would constitute "return information" under §6103(b)(2) of the Internal Revenue Code which is accorded a wide scope of disclosure. Internal Revenue Manual 9781-3482(2) (CCH) vol. 6, p. 28,691 (1982). A casual reading of §6103 exceptions reveals that disclosure is authorized to almost everyone except the armed forces.[26]

The government also argues that the ability of IRS to assess taxes will be impeded if disclosure is not allowed. That argument is pure balderdash. IRS is imbued with massive powers to determine tax liabilities.[27] Materials and testimony which a grand jury may compel are readily available to IRS through its traditional investigative channels. See 26 U.S.C. §§7602-7609. Section 7601 of the Internal Revenue Code (26 U.S.C. §7601) provides IRS with a "broad mandate" to investigate "persons who *may be* liable" for taxes without regard to probable cause. *United States v. Bisceglia*, 420 U.S. 141, 145-46 (1975).[28] Section 7602 gives IRS the power to summons and examine books, papers and records. It further gives IRS the right to compel testimony under oath.[29] The court of appeals correctly noted that "IRS has other effective statutory means to accomplish its civil purposes" (Pet.App. 10a).[30]

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[26] For example, §6103(k)(6) specifically authorizes IRS employees to disclose "return information" in connection with any audit or civil tax investigation. *See also*, Fed.Tax.Regs. Vol. 3 (1982) §301.6103(k)(6)-1(b).

Despite its awesome powers, the IRS has conducted no investigation of Mr. Baggot's possible civil tax liability.[31] IRS has simply sat back awaiting the secret grand jury materials it requested. The court below accurately recognized the disclosure request by IRS as an attempt to shortcut its traditional procedures in determining civil tax liabilities, at the expense of emasculating the principle of grand jury secrecy, and converting the grand jury process into a tool for IRS civil discovery.[32] In the court of appeals, the government admitted that it had alternative civil means to obtain the material sought, but argued that "it will take longer." (Pet.App. 11a). In this Court, the government argues for disclosure to avoid duplication. Grand jury secrecy should not be sacrificed for reasons of expediency or cost. *Procter & Gamble, supra,* 356 U.S. at 682; *United States v. Sobotka, supra,* 623 F.2d at 768 n.5. Additionally, the administrative convenience urged by the government does not satisfy the particularized need requirement. *In re Disclosure of Evidence,* 650 F.2d 599, 601-02 (former 5th Cir. 1981). *Cf. Miller,* 687 F.2d at 1092 n.17. The court of appeals recognized that "a liberal disclosure policy" would "facilitate tax collection," but balanced that interest against grand jury principles and tipped the scale in favor of proper grand jury functions and citizen's individual rights (Pet.App. 12a).

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[27] Describing the "inquisitorial powers" of the Commissioner of IRS as "draconian", one commentator noted:

> At least on the basis of the statutory language, summary powers of vast magnitude, far exceeding those of the FBI, Secret Service, CIA, Military Intelligence or of any Police Department in the land, are part of the arsenal of each one of the thousands of Revenue Agents and Special Agents employed by the Internal Revenue Service.

Ritholz, *The Commissioner's Inquisitorial Powers*, 45 Taxes 782 (1967).

[28] "The purpose of the statutes is not to accuse, but to inquire." *Id.*, 420 U.S. at 146; *see also, id.*, at 147-48.

[29] Congress recently enhanced the powers of IRS by enactment of Sections 331, 332 and 333 of the Tax Equity and Financial Responsibility Act of 1982.

[30] IRS procedures establish that use of "administrative process" is the "preferred" method of investigation. Internal Revenue Manual 9267.21 [CCH] vol.5, p.28,053-3 (1982).

[31] The court of appeals noted that "the failure of civil process has not been demonstrated in the record." (Pet.App. 11a).

There is nothing in the record to support the argument that IRS would be forced to curtail its assistance in grand jury investigations if the Court does not grant its disclosure request. The government admits that this case is grand jury generated so that any knowledge IRS has gained has come from assisting the grand jury under Rule 6(e)(3)(A)(ii). The government's argument is based on a misapprehension of the role which agencies play in grand jury proceedings. As argued above, agency assistance to a grand jury is limited to the enforcement of federal *criminal* law. The Solicitor's argument demonstrates a lack of understanding of the principles of grand jury secrecy and the grand jury function. By opting for automatic disclosure and exaggerating the role of IRS in grand jury proceedings, the government asks this Court to sanction the very abuse which Congress sought to guard against in enacting the 1977 amendments. IRS is seeking a *quid pro quo* for services rendered to the grand jury.[33] Congress did not provide a *quid pro quo* for agency assistance.

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[32] The court concluded: "If Congress had intended that grand jury materials could generally be used for the convenience of the government to facilitate its other legitimate purposes, particularly after the grand jury's legitimate criminal function had terminated, it could easily have provided for it." (Pet.App. 17a).

IRS is seeking to assume the rights and privileges of a grand jury; however, IRS "may exercise only that authority granted by Congress." *United States v. LaSalle National Bank*, 437 U.S. 298, 317 n.18 (1978). The Court should reject the government's "tail should wag the dog" argument and remind IRS of its subordinate role in grand jury proceedings. If disclosure is granted, IRS will have gained a partnership with attorneys for the government in grand jury proceedings in derogation of the principle of grand jury secrecy. If that partnership is formed, grand juries will have dual purposes, criminal and civil, and would easily be subject to the control of administrative agencies as a tool for civil discovery. That power should not be passed to IRS. A similar conclusion was reached in *Administrative Agency Access to Grand Jury Materials*, 75 Colum.L.Rev. 162, 179 (1975):

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[33] Interestingly, one commentator, in describing grand jury abuses inherent in expanded agency access to grand jury materials, predicted that agencies would seek a *quid pro quo* for their assistance. *Administrative Agency Access to Grand Jury Materials*, 75 Columbia L.Rev. 162, 181 (1975).

> [R]estrictions on agency investigations are fundamental to our liberties. The grand jury is properly an arm of the court, not the executive. The agencies are denied unrestrained inquisitorial powers comparable to the grand jury's because that kind of power should not be vested in the executive branch. Expansion of agency power through indirect access to grand jury material permits the executive to wield such power.

This Court should not preside over the destruction of historic grand jury functions.[34]

IRS suffers no practical prejudice from the denial of disclosure. Since the *Baggot* matter surfaced in the district court, Department of Justice plea agreements typically provide for a defendant to provide IRS with records for a civil audit and to waive any objection to the entry of an order under Rule 6(e) authorizing disclosure of grand jury materials to IRS.[36] Those grand jury materials may, of course, be used by IRS for civil purposes. Additionally, the primary lack of prejudice flows from the fact that IRS can use its extensive administrative processes to determine civil tax liabilities.

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[34] The government also asserts that 6(e) orders for civil purposes are "routinely" obtained. Neither the cases cited (Gov. Br. 35 n.30) nor relevant judicial authority support the government's claim. Both *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971), and *Hawthorne, supra*, addressed the pre-1977 amendment issue of the propriety of IRS agents providing technical assistance to grand juries. Both opinions were written by Judge Becker and established that grand jury materials must remain under the "aegis" of attorneys for the government. In neither case was the court presented with a specific request for disclosure to IRS for civil tax purposes and in *Hawthorne* Judge Becker modified his 6(e) order to comport with the stringent requirements for disclosure which he imposed. 406 F.Supp. at 1129. *In re July 1973 Grand Jury*, 374 F.Supp. 1334 (N.D. Ill. 1973), was primarily concerned with similar IRS technical assistance. The court misinterpreted *Procter & Gamble* and *Pflaumer* and, thus, it provides no support for disclosure here. Finally, *In re December 1974 Term Grand Jury Investigation, supra*, was distinguished above, pp. 24-25, and has been soundly disapproved by several courts.

In contrast to the paucity of cases cited by the government, there are several decisions that have rejected disclosure. *See, e.g., Cohen, supra; General Motors, supra; In re 1978-1980 Grand Jury Proceedings, supra; In re U.S. Order Pursuant to Provisions of Rule 6(e), supra.*

There is nothing in Rule 6(e), its legislative history or decisional authority that authorizes the broad disclosure which the government seeks nor do policy considerations support such disclosure. The court of appeals properly held that Respondent's "possible tax deficiency . . . is not of such consequence as to justify the fashioning of a special judicial exception to grand jury secrecy." (Pet.App. 18a-19a). Similarly, this Court should not legislate a special exception for the benefit of IRS and to the detriment of the grand jury system. The relief IRS seeks may be found in Congress, but should not be fashioned by this Court.

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[36] That practice demonstrates that the government recognizes that 6(e)(3)(C)(i) is the proper vehicle for disclosure. Relevant portions of a typical plea agreement are printed in App. 7a, *infra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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November 12, 1982

APPENDIX A

RULE INVOLVED

18 U.S.C. Federal Rule of Criminal Procedure 6(e): Recording and Disclosure of Proceedings.

* * * * *

(2) General Rule of Secrecy.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

* * * * *

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
(Filed 17 June 1977)

UNITED STATES OF AMERICA
vs.
JAMES E. BAGGOT

No. 77 Cr 564
Vio.: Title 7, United States Code,
Section 6c(a)(A)

THE UNITED STATES ATTORNEY charges:

1. In this information:
   - (a) A futures trade or contract is a commitment to buy (take delivery) or sell (make delivery) a specific amount and type of commodity at a future date at a price established at the time of the trade.
   - (b) A floor trader is a member of a contract market on the exchange floor who executes commodity futures trades for his own commodity trading account.
   - (c) A floor broker is a member of a contract market who executes commodity futures trades for the commodity trading accounts of other persons.
   - (d) A contract market is a board of trade designated by the U.S. Commodity Futures Trading Commission pursuant to Title 7, United States

Code, Section 7, for the purpose of establishing a market place for the trading of commodity futures contracts.

(e) A board of trade is any exchange or association whether incorporated or unincorporated, of persons who are engaged in the business of buying, or selling any commodity or receiving the same for sale on consignment.

(f) A fictitious trade is a prearranged noncompetitive commodity futures trade.

(g) A wash trade is a prearranged noncompetitive trade executed for the purpose of giving the appearance that purchases and sales have been made without actually taking a position on the market.

2. At all times material herein, the Board of Trade in the City of Chicago was a designated contract market for soybean futures pursuant to Title 7, United States Code, Section 7.

3. At all times material herein, James E. Baggot, Edward A. Arnold were floor traders and Robert N. Meyer, Jr., was a registered floor broker in soybean futures at the Board of Trade of the City of Chicago, pursuant to Title 7, United States Code, Section 6f.

4. Every transaction material herein, entered into by the defendant involving any commodity was or may have been used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof.

5. On or about July 15, 1975, at Chicago, in the Northern District of Illinois, Eastern Division,

JAMES E. BAGGOT,

defendant herein, willfully and knowingly did enter into the following commodity futures transaction:

Commodity and Future	Quantity (Thousands of bushels)	Price (Dollars per bushel)	Buy Broker	Buy Account	Sell Broker	Sell Account
September Soybeans	70	5.43	Meyer	Kerrins	Lyons	Lyons
September Soybeans	70	5.58	Baggot	Baggot	Meyer	Kerrins
September Soybeans	70	5.43	Lyons	Lyons	Baggot	Baggot

the defendant well knowing at the time that said commodity transaction was a prearranged, noncompetitive and fictitious sale;

In violation of Title 7, United States Code, Section 6c(a)(A).

COUNT II

THE UNITED STATES ATTORNEY further charges:

1-4. Paragraphs 1 through 4 of Count One of this indictment are realleged herein.

5. On or about November 18, 1975, at Chicago, in the Northern District of Illinois, Eastern Division,

JAMES E. BAGGOT,

defendant herein, willfully and knowingly did enter into the following commodity futures transaction:

Commodity and Future	Quantity (Thousands of bushels)	Price (Dollars per bushel)	Buy Broker	Buy Account	Sell Broker	Sell Account
August Soybeans	30	4.90	Meyer	Michalski	Arnold	Arnold
August Soybeans	30	5.02	Baggot	Baggot	Meyer	Michalski
August Soybeans	30	4.90	Arnold	Arnold	Baggot	Baggot

the defendant well knowing at the time that said commodity transaction was a prearranged, noncompetitive and fictitious sale;

In violation of Title 7, United States Code, Section 6c(a)(A).

DATE:

UNITED STATES ATTORNEY

APPENDIX C

As originally prescribed in 1946, Federal Rule of Criminal Procedure 6(e) provided in pertinent part:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before a grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

APPENDIX D

Pertinent Portion of Typical Plea Agreement:

12. Nothing in this agreement shall limit the Internal Revenue Service in its collection of any taxes, interest or penalties from the defendant (or defendant's spouse; partnership; corporation).

(1) Defendant agrees to transmit his original records, or copies thereof, to the Examination Division of the Internal Revenue Service so that the Internal Revenue Service can complete its civil audit of defendant and (*).

(2) Defendant agrees to provide any additional books and records of his (and of *) which may be helpful to the Examination Division of the Internal Revenue Service to complete its civil audit of defendant (and *).

(3) Defendant will interpose no objection to the entry of an order under F.R.Cr.P. 6(e) authorizing transfer to the Examination Division of the Internal Revenue Service of his documents, or documents of third parties, in possession of the federal grand jury, the United States Attorney, or the Criminal Investigation (formerly Intelligence) Division of the Internal Revenue Service.

Petitioner's Reply Brief

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No. 81-1938

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES E. BAGGOT

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Page

Cases:

Able Investment Co. v. *United States*, 53 F.R.D. 485 3

April 1977 Grand Jury Proceedings, In re, 506 F. Supp. 1174 3

Biaggi, In re, 478 F.2d 489 5

Cohen v. *Commissioner*, 42 T.C.M. (CCH) 312 3

December 1974 Term Grand Jury Investigation, In re, 449 F. Supp. 743 2-3

Douglas Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 6

Grand Jury Proceedings, Miller Brewing Co., In re, 687 F.2d 1079 .... 1, 2, 3

July 1973 Grand Jury, In re, 374 F. Supp. 1334 2

1978-1980 Grand Jury Proceedings, In re, 503 F. Supp. 47 3

Peterson v. *United States*, 52 F.R.D. 317 3

Report & Recommendation of June 5, 1972 Grand Jury, In re, 370 F. Supp. 1219 5

Robert Hawthorne, Inc. v. *Director of Internal Revenue*, 406 F. Supp. 1098 2

United States v. *El Paso Co.*, 682 F.2d 530 3

Page

Cases—Continued:

United States v. *Proctor & Gamble Co.*, 356 U.S. 677 .... 2, 5

United States v. *Sells Engineering, Inc.*, cert. granted, No. 81-1032 (May 3, 1982) 5

William H. Pflaumer & Sons, Inc., In re, 53 F.R.D. 464 2

Rules:

Fed. R. Civ. P. 26(b)(3) 3

Fed. R. Civ. P.:

Rule 6(e) 3, 5

Rule 6(e)(3)(C)(i) 1, 4

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REPLY BRIEF FOR THE UNITED STATES

---

1. Respondent suggests (Resp. Br. 16-18) that the subsequent decision of the court below in *In re Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079 (1982), indicates that the circuit has not established an unreasonably narrow interpretation of Fed. R. Crim. P. 6(e)(3)(C)(i), because in that case it concluded that the grand jury materials sought by the IRS were properly disclosed "preliminarily to or in connection with a judicial proceeding." But nothing in *Miller Brewing* suggests that we have misread the Seventh Circuit's view of the scope of Rule 6(e)(3)(C)(i). Indeed, in distinguishing *Baggot*, the court explained that in *Miller Brewing* the district court "could be certain that there would be a 'judicial proceeding' of some kind," because Miller had stated in an affidavit that it would contest the deficiency that had been assessed by filing an

action in the Tax Court (687 F.2d at 1094).[1] Thus, as in *Baggot*, the court in *Miller Brewing* apparently read the "preliminarily to * * * a judicial proceeding" language as requiring virtual certainty that the judicial proceeding will occur. It is scarcely a significant limitation of *Baggot* to permit the disclosure of grand jury materials when the taxpayer has filed an affidavit attesting to his intention to institute a judicial proceeding.[2]

2. As we explain in our main brief, the position we advocate is based on a long-standing administrative practice which has been thought to reflect a reasonable construction of this Court's decision in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), that ultimate civil use of grand jury materials is not improper, and which has been approved by several district courts. *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971); *Robert Hawthorne, Inc.* v. *Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976). See also *In re July 1973 Grand Jury*, 374 F. Supp. 1334 (N.D. Ill. 1973); *In re*

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[1] By the time the case reached the court of appeals, the judicial proceeding had already started in the Tax Court; the IRS thus would have been entitled to the materials sought under the "in connection with" provision of the Rule in any event.

[2] Respondent (Resp. Br. 14) and amicus General Motors Corporation (Br. 16-17) find it significant that relatively few audit cases result in judicial resolution of tax liability. Our argument does not, of course, turn on the probability that judicial proceedings will actually result in any given case. But even if the probability of a judicial proceeding is deemed relevant, the statistics respondent and amicus rely upon are essentially meaningless to the question in this case. Those statistics establish only that a very small percentage of all cases audited by the Service result in litigation. They do not indicate what percentage of cases which are investigated by a grand jury are followed by civil litigation. Respondent's related claim (Resp. Br. 13-14) that his guilty plea does not suggest a tax liability overlooks the fact that he admitted receiving unreported cash kickbacks (Gov't Br. 4 n.1).

December 1974 Term Grand Jury Investigation, 449 F. Supp. 743 (D. Md. 1978).[3] Respondent's assertion (Resp. Br. 18) that this position is inconsistent with "the settled weight of authority" rests on the decision below and *Miller Brewing, supra*, two district court opinions (one of which is currently pending on appeal)[4], and a decision of the Tax Court (*Cohen* v. *Commissioner*, 42 T.C.M. (CCH) 312 (1981)).[5] The Tax Court decision, however, accepts precisely the administrative practice to which we refer. The grand jury material used in the civil tax investigation in that case was suppressed because the government agents involved had failed to follow that practice. As the Tax Court explained (42 T.C.M. (CCH) at 316-317), suppression was ordered because of the "utilization of grand jury testimony and material for civil tax purposes prior to obtaining a court order authorizing disclosure under Rule 6(e) of the Federal Rules of Criminal Procedure * * * and because the District Court did not enter a 'curative' 6(e) order after it was apprised of the violations." Thus, the Tax Court simply required compliance with the established administrative practice that the court of appeals rejected in this case.[6]

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[3] Amici Fred Witte, *et al.* recognize (Br. 15-18) that this administrative practice has consistently been followed by the Internal Revenue Service and the Department of Justice over several years. Both Witte (Br. 10-15) and amicus General Motors Corporation (Br. 20-22) argue that acceptance of the government's position will increase the risks of grand jury abuse at the hands of the Internal Revenue Service. Yet neither the amici nor respondent provide any basis for that assertion or even suggest that the practice has led to the abuse of grand juries which they forecast.

[4] *In re April 1977 Grand Jury Proceedings*, 506 F. Supp. 1174 (E.D. Mich. 1981), appeal pending, No. 81-1182 (6th Cir.); *In re 1978-1980 Grand Jury Proceedings*, 503 F. Supp. 47 (N.D. Ohio 1980).

[5] Respondent (Resp. Br. 14) and amicus General Motors Corporation (Br. 28-29) also refer to two district court cases (*Peterson* v. *United States*, 52 F.R.D. 317, 320-321 (S.D. Ill., 1971); *Abel Investment Co.* v. *United States*, 53 F.R.D. 485, 490 (D. Neb. 1971), approved in *United States* v. *El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982)) holding that certain documents generated in IRS civil tax investigations are subject to discovery under Fed. R. Civ. P. 26(b)(3) because they were not prepared "in anticipation of litigation." But nothing in those cases suggests that the "in anticipation of litigation" standard is the same as the "preliminarily to * * * a judicial proceeding" standard of Rule 6(e), and the entirely unrelated purposes of the two Rules strongly suggest that different standards should apply.

3. Finally, although respondent asserts that the judgment of the court of appeals should be affirmed because the government failed to make a showing of "particularized and compelling need" for access to the matters occurring before the grand jury (Resp. Br. 29-37), it would be premature for the Court to consider that contention in this case. Contrary to respondent's claim (Resp. Br. 30), the court of appeals did not address the question whether the government had demonstrated that the Internal Revenue Service's need for the information outweighed any residual interest in grand jury secrecy in this case.[7] Although the district court intimated (Pet. App. 35a, 46a) that it might require the

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[6] The legislative history upon which respondent (Resp. Br. 39-45) and amicus General Motors Corporation (Br. 11-15) rely also expresses congressional concern about *unsupervised* agency access to grand jury materials. As we explain in our main brief (at 27-31), despite these concerns, Congress assumed that the IRS would continue to have access to grand jury materials for civil tax investigations pursuant to court order. And, of course, respondent and amici are simply incorrect in asserting that we are urging that any administrative use of grand jury materials can be authorized as "preliminarily to * * * a judicial proceeding". Instead, as we explain in our main brief (at 20-26), there is a clear distinction between tax investigations, subject to a judicial trial de novo, and agency proceedings reviewable only on the agency record. We do not in this case challenge the decisions, on which respondent and amici rely, holding that the latter are not within Rule 6(e)(3)(C)(i); we urge only that those decisions are inapplicable here.

[7] Respondent (Resp. Br. 30) has misread the court of appeals' opinion. In reversing the district court's release of the disputed information to the IRS under its general supervisory powers over the grand jury, the court of appeals stated (Pet. App. 9a-11a) that disclosure of matters

government to make a showing of particularized need, it appeared to be satisfied that such a need existed here because it ordered disclosure of the grand jury materials. The court of appeals, rejecting the district court's use of its general supervisory power and finding the Service's investigation not to be "preliminar[]y to * * * a judicial proceeding," had no occasion to consider the "particularized need" requirement. The court of appeals' opinion cannot be interpreted as holding that the failure to show a "particularized need" leads to the conclusion that disclosure is not "preliminar[]y to * * * a judicial proceeding."

Since neither court below has addressed the "particularized need" issue, there is nothing for this Court to review with respect to that question. In any event, the question whether the government must make the type of "particularized need" showing required of private litigants to obtain disclosure of matters occurring before a grand jury is presented in a somewhat different context in *United States* v. *Sells Engineering, Inc.*, cert. granted, No. 81-1032, (May 3, 1982), and the decision in *Sells* may provide guidance on that question should its resolution be necessary on remand following decision on the question here presented.[8]

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occurring before the grand jury might be appropriate in some circumstances, even where not expressly authorized by Rule 6(e), but concluded that this case did not present such an "extraordinary and compelling need for disclosure in the interest of justice" as would warrant such non-Rule 6(e) disclosure. See, *e.g.*, *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973); *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219 (D.D.C. 1974). That holding does not address the requirement imposed by *United States* v. *Procter & Gamble Co.*, *supra*, that private parties seeking disclosure under Rule 6(e) demonstrate a "particularized need" for access to grand jury materials.

[8] Respondent errs in asserting (Resp. Br. 36-37) that our position here is inconsistent with our position in *Sells*. We suggested in this case (Gov't Br. 17-18) only that the court of appeals' concerns about the consequences of a broad reading of Rule 6(e) are unjustified in light of

For the foregoing reasons, and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

FEBRUARY 1983

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this Court's holding in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979). We have not addressed the "particularized need" question in this case because it is not at issue here.

Amicus Brief

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No. 81-1938

In The

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October Term, 1982

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES E. BAGGOT,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Brief for General Motors Corporation as Amicus Curiae

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QUESTION PRESENTED

Whether an audit by the Internal Revenue Service to determine if any additional taxes are due is "preliminarily to or in connection with a judicial proceeding" under Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 2

SUMMARY OF ARGUMENT 8

ARGUMENT:

I. CONGRESS IN 1977 INTENDED TO PREVENT WHAT THE GOVERNMENT NOW SEEKS 11

II. CASE LAW REJECTS THE GOVERNMENT'S POSITION THAT AN IRS AUDIT IS A MATTER WHICH OCCURS "PRELIMINARILY TO" A JUDICIAL PROCEEDING 16

III. THE PHRASE "PRELIMINARILY TO . . . A JUDICIAL PROCEEDING" SHOULD NOT ENCOMPASS ADMINISTRATIVE PROCEEDINGS SUCH AS AN IRS AUDIT 18

IV. THE SCOPE OF "PRELIMINARILY TO . . . A JUDICIAL PROCEEDING" IN RULE 6(e)(3)(c)(i) IS CLEARLY NOT BROAD ENOUGH TO INCLUDE CIVIL TAX AUDITS 26

CONCLUSION 30

APPENDICES A-1

TABLE OF AUTHORITIES

Page

Cases:

Abel Investment Company v. United States, 53 F.R.D. 485 (D. Neb. 1971) 28

April 1977 Grand Jury Proceedings, In re, 506 F. Supp. 1174 (E.D. Mich. 1981) 2, 8, 11, 16, 17

April 1977 Grand Jury Proceedings, In re, United States v. General Motors Corporation, No. 81-1182 2

Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980) 17

December 1974 Term Grand Jury Investigation, In re, 449 F. Supp. 743 (D. Md. 1978) 18

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 ..... 9, 30

G.M. Leasing Corp. v. United States, 429 U.S. 338 28

Grand Jury Investigation of Uranium Industry, In re, 1979-2 Trade Cases [CCH] ¶ 62,798 (D.D.C. 1979) 17

Grand Jury Matter, In re, 495 F. Supp. 127 (E.D. Pa. 1980) 17, 18

1978-80 Grand Jury Proceedings, In re, 503 F. Supp. 47 (N.D. Ohio 1980) 17

Grand Jury Proceedings, In re, 309 F.2d 440 (3d Cir. 1962) 17

Hartford Electric Light Co. v. Federal Power Com., 131 F.2d 953 (2d Cir. 1942), *cert. denied*. 319 U.S. 741 26

Judge Elmo B. Hunter's Special Grand Jury, In re, 667 F.2d 724 (8th Cir. 1981) 18

J. Ray McDermott & Co., In re, 622 F.2d 166 (5th Cir. 1980) 17

Page

Peterson v. United States, 52 F.R.D. 317 (S.D. Ill. 1971) 28

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 19

Proceedings Before the Federal Grand Jury for the District of Nevada, In re, 487 F. Supp. 1098 (D. Nev. 1980) 17

Spokane & Inland Empire R.R. v. United States, 241 U.S. 344 26

United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980) 17

United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982) 29

United States v. Johnson, 319 U.S. 503 19

United States v. LaSalle National Bank, 437 U.S. 398 21

United States v. Procter & Gamble Co., 356 U.S. 677 8, 18, 22

United States v. Sells Engineering, Inc., No. 81-1032 9

United States v. Young, 494 F. Supp. 57 (E.D. Tex. 1980) 17

Constitution, statutes and rules:

18 U.S.C. § 1001 3

28 U.S.C. § 515 5

Internal Revenue Manual
- 4015.1(2) 27
- 4015.1(3) 27
- 4015.3(1) 27

Internal Revenue Code
- § 7602 20
- § 7602(1) 20

	Page
§ 7603	20
§ 7608	20
§ 7609	20
Tax Equity and Fiscal Responsibility Act of 1982	
§ 331	20, 21
§ 332	20
§ 333	21
Federal Rules of Criminal Procedure	
Rule 6(e)	*passim*
Rule 6(e)(2)	8
Rule 6(e)(3)(A)	9, 10
Rule 6(e)(3)(A)(ii)	10, 14
Rule 6(e)(3)(C)(i)	8, 9, 10, 15

Miscellaneous:

95 Cong. Rec. H7867 (daily ed. July 27, 1977) (remarks of Mann)	15
H.R. Rep. No. 95-195, 95th Cong., 1st Sess. 5 (1977)	11, 13
S. Rep. No. 95-354, 95th Cong., 1st Sess. 7 reprinted in [1977] U.S. Code Cong. & Ad. News 527, 530	11, 14
Proposed Amendment to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977), at p. 86 (statement of Wayne LaFave)	13
Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227 (1979)	15

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Brief for General Motors Corporation as Amicus Curiae

This brief is being filed on behalf of General Motors Corporation with the consent of all parties.

INTEREST OF THE AMICUS CURIAE

General Motors Corporation ("GM") is the appellee in an appeal pending in the United States Court of Appeals for the Sixth Circuit, styled *In re April 1977 Grand Jury Proceedings, United States v. General Motors Corporation*, No. 81-1182. Like the present case, that case involves the question whether the Internal Revenue Service ("IRS") may routinely gain access to grand jury materials for use in auditing tax returns or for other administrative uses.[1] General Motors' interest as *amicus* arises from the fact that the *General Motors* case illustrates more clearly than the case at bar how allowing the access which the IRS seeks can permit grand juries to become routine tools of the administrative process. A summary of the facts of the *General Motors* case, and of the continuing efforts of the district judge to protect the grand jury from possible abuse, will make this clear.

Like other major corporations, GM is subject to a continuing audit of its federal tax returns by a team of Revenue Agents of the IRS. The audit team generally examines two taxable years at a time. Many tax issues are raised by the audit team in the audit of each tax year. Most issues are resolved by agreement with the examining agents and are so listed in the examining agent's report which concludes the audit. Usually, a few issues remain as

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[1] In the *General Motors* case the district court held (506 F. Supp. 1174) that the IRS was not entitled to receive the information obtained from GM through grand jury subpoenas. The district court concluded that the continuing audit of GM's 1972 and 1973 federal income tax returns is not "preliminarily to or in connection with a judicial proceeding" under Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure. The government appealed that decision to the Sixth Circuit, and the appeal has been briefed and argued. Shortly after this Court granted the writ of certiorari in the case at bar, the Sixth Circuit stayed further consideration of the government's appeal pending this Court's disposition of this case.

"unagreed" and these customarily are taken to the Appeals Office of the IRS by GM for resolution.

In 1975 a new method was proposed for auditing GM's tax treatment of expenditures for machinery spare parts and other materials consumed in the production process (known as "expense materials"). This method required GM to conduct an individual survey at each of its 125 plants to determine the amount of expense materials on hand, and GM agreed to do so. The revenue agent responsible for this issue questioned the survey results. He began a series of visits to GM plants in the Detroit area to examine the manner in which the survey was conducted. He then wrote a referral report recommending a joint civil/criminal investigation. In October 1976 Special Agents of the IRS Intelligence Division[2] informed GM that a joint investigation had commenced, asserting that the criminal issue was whether the survey contained material false statements in violation of 18 U.S.C. § 1001.

The "joint investigation" never investigated anything. The Special Agents demanded in writing that GM produce voluminous documents in ten working days, and that GM permit the Special Agents to interview a substantial number of GM employees without counsel being present.[3] GM refused to permit interviews to be conducted on its premises under these conditions.

Although Congress has given the IRS substantial powers to compel the testimony of witnesses and the production of documents and to execute and serve search warrants, 26 U.S.C. § 7602, the IRS elected not to use its own statutory powers to pursue its investigative goals. Instead, in April 1977 two IRS Special Agents served 58 grand jury subpoenas on GM. These 58 subpoenas contained the same requests for documents that had been contained in the written demands of the Special Agents at the commencement of the "joint investigation."

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[2] At that time the Criminal Investigation Division of the IRS was named the Intelligence Division.

[3] The power to issue subpoenas to produce documents on short notice and to question witnesses without presence of counsel is vested exclusively in the grand jury.

GM promptly moved in the district court to quash the grand jury subpoenas. In that proceeding, GM learned that the IRS had assigned sixteen Special Agents to "assist the grand jury," including the Special Agents who had conducted the "joint investigation," and that an IRS attorney had been assigned to question witnesses before the grand jury. This same IRS attorney had drafted a letter to the Justice Department requesting a grand jury which stated:

> At the appropriate time we will request that an order be sought from the Court authorizing the disclosure of grand jury information to the IRS under the provisions of Rule 6(e) . . . . [for civil purposes].[4]

The Justice Department assigned two attorneys to join the sixteen IRS Special Agents and the IRS attorney in conducting the grand jury investigation.

In seeking to quash the grand jury subpoenas, GM argued in the district court that the grand jury was being used by the IRS. This issue was clearly framed by the court during oral argument in colloquy with Mr. Forrest, who represented the government:

> THE COURT: There is a potential, isn't there? General Motors made the argument, if I understood their argument correctly that if the government, I think I am quoting them now, gets away with it in this situation, from now on they will use the grand jury at their will as an investigative tool against large corporations. A lot of different inferences can be drawn from the facts. One can infer criminal intent from facts. So you can almost always find some evidence of criminal intent if you want to look for it hard enough.

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[4] Transcript of hearing before District Judge Churchill, June 28, 1977, at 10.

> You could infer it. Somebody else may disagree with you. What's stopping the United States Government from using the grand jury as an investigative tool in almost every big tax case?
>
> MR. FORREST: It may well do that because it's a --
>
> THE COURT: Such a useful tool?[5]

The district court thoroughly considered how to prevent grand juries from being convened as tools for administrative agencies without hampering the grand jury's important function to uncover criminal activity.

> THE COURT: If a grand jury is allowed to go on under conditions . . . that do not in any way restrict the subpoena power, the ability to gather evidence but under conditions which absolutely assured them that in no circumstances the data would be used for civil purposes, that would take away the incentive of abuse, wouldn't it, without taking away the right of criminal investigation?
>
> MR. FORREST: Yes, but the question is again we go back --
>
> THE COURT: You don't like that thought.
>
> MR. FORREST: Is that ripe for consideration by this tribunal? I would suggest not.
>
> Although I am encroaching a little bit on Mr. McBride's argument here, you have to look — this is why the government recognizing that these arguments would be made, has gone to these steps including the April 1 letter as supplemented by this letter presented to the Court today to seal off these employees to say, "Look Mr. Piliaris[6] is here, not under a sham

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[5] Transcript of hearing before District Judge Churchill, June 21, 1977, at 211-12.

[6] Mr. Piliaris was an attorney employed by the IRS who questioned witnesses before the grand jury after obtaining a letter from the Justice Department appointing him a "Special Attorney" pursuant to 28 U.S.C. § 515.

> or subterfuge to get charts for use in a civil case. He is here as a criminal tax attorney."
>
> THE COURT: What does it mean to seal it off when you can come in and you unseal it later? Sealing it off merely protects you from a claim that you are misusing it but from the taxpayer's point of view if you do use a grand jury to obtain data for civil purposes, you seal it off until a criminal investigation or proceedings or whatever it is, is over with then obtain a court order to get it and you have accomplished your purpose, if that was your purpose, haven't you?
>
> MR. FORREST: Why? I would suggest these arguments are properly raisable at that time if and when such a motion is made. I would suggest there is no probability, contrary to your strong feeling otherwise, that such a motion may or may not be made. We don't know yet. Perhaps Mr. McBride, when he gets to his half of the argument will speak to that again but I would say that the efforts made by the government to seal this off at this time show our good faith and intentions and show that this, the purpose of this case is to investigate possible criminal conduct where an investigation has not — we haven't yet got to the truth. That is what we are seeking.
>
> The letters of April 1, the affidavits signed by the IRS personnel and our proposal to have the IRS personnel who are to be involved directly with the grand jury evidence brought before the Court and individually warned of the possibility of a contempt violation, are more than sufficient to seal off any improper use of the grand jury material.
>
> THE COURT: For how long?
>
> MR. FORREST: For as long as — for eternity.[7]

In the *General Motors* case, "eternity" ended a few weeks after the IRS elected to resume its civil audit in 1980.

Judge Churchill ultimately ruled in June 1977 that the grand jury should go forward under a protective order preventing IRS supervisory review of grand jury materials.

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[7] Transcript, *supra* note 5, at 188-89.

The grand jury commenced interrogating witnesses one week later, and continued its twice-weekly sessions until April 5, 1978. Over one hundred present and former GM employees were interrogated before the grand jury by the IRS attorney and the two Justice Department attorneys, while the grand jury issued 168 subpoenas duces tecum to GM for documents which were analyzed by the IRS Agents. In June 1980 the Justice Department informed GM that the grand jury investigation was at an end.[8] No indictments were returned.

Three months later Mr. McBride of the Justice Department and Mr. Forrest, the same government attorney who had argued to the district court that there was "no probability" one way or the other that the government would make a Rule 6(e) motion following the termination of the grand jury, filed a Rule 6(e) motion for disclosure to the IRS of selected grand jury materials, including the transcripts of testimony of twenty-eight past or present GM employees who had been grand jury witnesses. Subsequently, at the hearing on the motion, Mr. Forrest also sought authorization for the IRS agents who had "assisted the grand jury" to participate in the audit of General Motors' tax returns using the knowledge gained through use of the grand jury process.

At that hearing, the government conceded that it had not shown particularized need for the materials, and did not contend that the witnesses who appeared before the grand jury and the documents furnished to the grand jury were unavailable to the IRS through its normal procedures. Instead, the government argued that it was entitled to have grand jury material disclosed to the IRS for use in an audit of a federal tax return because a tax audit is *per se* "preliminarily to a judicial proceeding," and because a federal administrative agency is exempt from the requirement of showing "particularized need" to gain access to grand jury materials.

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[8] In April 1978 the grand jury was suspended when a panel of the Sixth Circuit ruled (573 F.2d 936) that the presence of the IRS attorney in the grand jury room was improper. The panel decision was vacated in September 1978 when the court *en banc* held that it lacked jurisdiction to hear the appeal (584 F.2d 1366). Subsequently, no additional subpoenas were issued to GM.

Judge Churchill denied the government's motion in an oral opinion, holding that an IRS audit is not a matter occurring "preliminarily to a judicial proceeding." Judge Churchill's oral opinion has been transcribed in Appendix A to this brief because it states forcefully and concisely the reasons for imposing strict limitations upon access by government agencies to grand jury information. In particular, Judge Churchill noted that if civil use of grand jury information routinely follows the grand jury proceeding, then "the temptation is going to be overwhelming" for administrative agencies to "do it the easy way" by seeking a grand jury, which may or may not indict but which delivers the civil case to the agency "in a handbasket." (App. A-5). Judge Churchill subsequently issued a written opinion (506 F. Supp. 1174), stating that while "neither court rule nor routine judicial supervision can be expected to eliminate grand jury abuse. . . . if the Court were to grant the government's motion in this case, it would be the first chapter in a book that ought not to be written." 506 F. Supp. at 1181.

SUMMARY OF ARGUMENT

The traditional rule of grand jury secrecy codified in Rule 6(e)(2) is protected by allowing only narrow exceptions in cases of "particularized need" when the veil of secrecy is "lifted discretely and limitedly." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683. Rule 6(e)(3)(C)(i) permits disclosure only when the applicant can show compelling necessity for such information to "prevent a possible injustice in another judicial proceeding." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222. Prevailing case law requires any applicant for disclosure of grand jury material, including the government, to meet this demanding test. Thus the governmental or private applicant must show *both* that a pending or impending judicial proceeding exists, and that disclosure of particular grand jury material is essential to avoid a possible injustice in that judicial proceeding.

This case and *United States v. Sells Engineering, Inc.*, No. 81-1032, present closely related questions involving the secrecy of grand jury proceedings. In each of these cases, the government failed to persuade the circuit courts that Rule 6(e) gives government personnel broad access to grand jury materials for civil purposes. By bringing both cases to this Court for review, the government hopes to obtain two rulings which together would enable it to accomplish indirectly under Rule 6(e)(3)(C)(i) – the judicial proceeding exception – what is obviously forbidden directly under Rule 6(e)(3)(A), which prohibits disclosure of grand jury material to supporting government personnel for civil enforcement purposes.

In the case at bar, the government argues, in the face of very strong case authority to the contrary, that *every* IRS civil tax audit occurs "preliminarily to" a judicial proceeding and that *every* government request for a Rule 6(e)(3)(C)(i) disclosure order in connection with an IRS tax audit *automatically* satisfies that crucial procedural requirement for invoking this exception to the strong policy protecting grand jury secrecy. In *Sells*, the government argues that, although all other applicants for a Rule 6(e)(3)(C)(i) disclosure order must show a compelling and particularized need for the material sought, the government need only show a "rational relationship" between the materials sought and the subject matter of the proceeding for which the materials would be obtained – a requirement so minimal as to be almost no requirement at all.

If the government were to succeed in establishing both of these positions, it would in effect accomplish the reversal of the decision deliberately made by Congress in 1977, clearly expressed in Rule 6(e)(3)(A)(ii), to forbid IRS personnel access to grand jury material for civil tax audit purposes. For if, as the government contends, *every* IRS audit satisfies the "judicial proceeding" requirement, and if the government need not show particularized need, the federal district court's function under Rule 6(e)(3)(C)(i) is almost purely ministerial,[9] especially since applications are frequently sought and granted *ex parte*. The bizarre result would be that the IRS could obtain grand jury material almost as routinely as if Congress in Rule 6(e)(A)(ii) had permitted it access without court approval, rather than forbidding such access.

Current law, as reflected by the decisions below in *Baggot* and *Sells*, does not permit the government to circumvent the deliberate Congressional policy embodied in Rule 6(e)(3)(A). Rule 6(e)(3)(C)(i) is, and is intended to be, a narrow exception to the centuries-old and firmly established policy of protecting grand jury secrecy. In sharp contrast, the government argues for almost automatic IRS access with no judicial safeguards against abuse. This position is contrary to the spirit and established meaning of Rule 6(e), and to the clear purpose of the 1977 Congressional amendment to Rule 6(e)(3)(A)(ii), which was designed to prevent just this abuse.

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[9] The Brief of the United States, page 18, argues that grand jury abuse is prevented by requiring the government to show in its disclosure request "that the grand jury has been utilized in good faith." The government fails to explain to this Court that its usual method of showing "good faith" is to present a meaningless and incontrovertible affidavit signed by the attorney for the government asserting in conclusory language that he conducted the grand jury in good faith. Judge Churchill noted in the *General Motors* case that good faith use of the grand jury is only the first of three elements the government must show in seeking a Rule 6(e) order, 506 F. Supp. at 1177.

ARGUMENT

I. CONGRESS IN 1977 INTENDED TO PREVENT WHAT THE GOVERNMENT NOW SEEKS.

Prior to the amendments to Rule 6(e) in 1977, substantial litigation had arisen concerning the permissible scope of disclosure under that Rule, which this Court promulgated in 1946, and Congress implicitly approved, as part of the original Federal Rules of Criminal Procedure. Rule 6(e) then stated in part that disclosure of matters occurring before the grand jury may be made "to the attorneys for the government for use in the performance of their duties." Rule 6(e) went on to state that otherwise such disclosure may be made

> only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

The 1946 version basically codified the case law which had developed in the federal courts prior to the existence of the Federal Rules of Criminal Procedure. That case law enforced grand jury secrecy except in very unusual circumstances. But subsequent to promulgation of the Rules the government began to use administrative agency personnel, such as IRS agents, to assist in grand jury investigations, even though no specific language allowed for or regulated this procedure. Controversy developed as to the propriety and legality of the government's expansion of traditional grand jury procedure, and especially as to the use of grand jury materials by assisting agencies to further purely civil purposes. The case law that developed under Rule 6(e) was confused and marked by contradictory decisions. H.R. Rep. No. 95-195, 95th Cong., 1st Sess. 5 (1977); S. Rep. No. 95-354, 95th Cong., 1st Sess. 7, reprinted in [1977] U.S. Code Cong. & Ad. News 527, 530.

In response to these conflicting decisions and to requests for clarification from the courts, this Court in 1976 promulgated an amendment to Rule 6(e). That amendment made no changes in the "judicial proceedings" clause, but it defined "attorneys for the government" to include "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties," and it made technical changes to Rule 6(e). The amendment was then transmitted to Congress.

Congress gave the proposal full and careful consideration. First, it adopted a statute (P.L. 94-349, 90 Stat. 822) postponing the effective date of the proposed changes in the Rule. The Subcommittee on Criminal Justice of the House Judiciary Committee then held hearings on the amendments to Rule 6(e). On February 24, 1977, Professor Wayne LaFave appeared on behalf of the Advisory Committee on Criminal Rules of the Judicial Conference to explain the purposes of the changes to Rule 6(e). He stated:

> I think the one thing that needs to be stressed about this particular change is that it only contemplates the U.S. attorney using these other Government personnel when it is necessary for the U.S. attorney's work. What it does not contemplate at all is the turning over of this information to the other Government agencies themselves. The circumstances in which that can happen are dealt with in another part of Rule 6(e) which is not changed at all: namely, the part that says that a court can direct disclosure only preliminary to or in connection with a judicial proceeding.
>
> There is a good bit of case law that has developed as to the meaning of that part of 6(e) and, generally, *the cases say that the grand jury material cannot be turned over to an administrative agency for purely administrative proceedings, because that is not a judicial proceeding. But there are occasions when an administrative agency can show sufficient need with respect to pending judicial proceedings.*

> *The point is that no change is being made in that part of the rule, so the barriers to administrative agencies getting their hands on this material still exist.* (Emphasis added.)

Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 95th Cong., 1st Sess., on Proposed Amendments to the Federal Rules of Criminal Procedure, Feb. 23, 24, and March 2, 1977, Serial No. 2, at p. 86.

In spite of these assurances from the Advisory Committee, and from the Justice Department, that this Court's proposed amendment would not expand administrative agency use of grand jury material, the Subcommittee remained concerned. It deleted this Court's proposed definition of "attorneys for the government" because it feared that the new language might open agency access to grand jury material. House Report No. 95-195, 95th Cong., 1st Sess. (April 11, 1977), accompanying H.R. 5864, explained the deletion made by the House Committee as follows (p. 4):

> The substantive change to Rule 6(e) has been much criticized. There was concern that it would permit too broad an exception to the rule of keeping grand jury proceedings secret. It was feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case. This would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them.

The bill then passed the House with this Court's technical changes to the Rule but without any substantive changes.

The Senate Judiciary Committee did not conduct hearings, and instead relied on the extensive House hearings.

It proposed further amendments to the House Bill, including the partial incorporation into Rule 6(e) of this Court's proposed definition of "attorneys for the government." However, in order to eliminate the threat to grand jury secrecy which it perceived to exist in this Court's version of Rule 6(e), the Senate Committee added an amendment permitting assisting governmental personnel access to grand jury material for the purpose of assisting the grand jury, subject to the important limitation italicized below:

> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury . . . may be made to:
>
> (i) . . .
>
> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty *to enforce federal criminal law.*

The Senate Report states that "the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws . . . ." Senate Report No. 95-354, 95th Cong., 1st Sess., p. 8.

The Senate then passed its amended version of Rule 6(e) and the House of Representatives concurred in the Senate version. The President signed the bill as adopted by Congress. P.L. 95-78, 91 Stat. 319, and this is the legal basis of the present rule.

The legislative history of the 1977 amendments shows that Congress deliberately added an important clause, "to enforce federal criminal law", to Rule 6(e)(3)(A)(ii) in order to make certain that administrative agencies could not receive grand jury material except with the approval of a federal judge "preliminarily to or in connection with a judicial proceeding." Congress, like this Court, made no change in the judicial proceeding clause, Rule 6(e)(3)(C)(i), and sponsors of the legislation stated repeatedly that no changes in the interpretation and application of that clause were intended or desired. *E.g.*, Congressional Record, 95th Cong. 1st Sess. p. H 7867 (daily ed. July 27, 1977) (remarks of Representative Mann). Moreover, because Rule 6(e)(3)(C)(i) was not changed, the 1977 amendments had no effect on the requirement under then-existing federal court decisions that applicants under it show particularized need. See *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1318-19 (1979).

Although Congressional intent in 1977 is clear, the government now argues for a much broader interpretation of Rule 6(e)(3)(C)(i) because of supposed practical necessity. It urges that this Court should now hold that tax audits are *per se* "preliminarily to" a judicial proceeding, despite the legislative history and case law to the contrary, so that the IRS can more efficiently collect tax revenue.

When the IRS needs to improve its civil enforcement powers, Congress has readily responded, as in the Tax Equity and Fiscal Responsibility Act of 1982 (discussed at pages 20-21, *infra*). Congress has not, however, amended Rule 6(e) to give the IRS the result it wants in the two cases presently before this Court. Congress has supplied the IRS with powerful, legitimate weapons to combat tax evasion, but it has not authorized, in Rule 6(e) or elsewhere, general subversion of grand jury secrecy. Dissatisfied with Rule 6(e) as revised by Congress in 1977, the government now seeks a broader rule in this Court, pleading practical necessity. The government should not be allowed to succeed in this effort, for Congress has clearly drawn the line far short of what the government seeks here.

II. CASE LAW REJECTS THE GOVERNMENT'S POSITION THAT AN IRS AUDIT IS A MATTER WHICH OCCURS "PRELIMINARILY TO" A JUDICIAL PROCEEDING.

The government argues that every civil tax audit is *per se* preliminary to a judicial proceeding. This interpretation of Rule 6(e) would seriously impair the secrecy of the grand jury because it would eliminate the judicial proceeding requirement for all practical purposes. Every administrative audit, investigation, or hearing involves a possibility of subsequent litigation. Every decided case on this issue would have satisfied the judicial proceeding test under the government's loose interpretation. Because the government's contention — that the mere possibility of eventual litigation satisfies the Rule — would obliterate the judicial proceeding requirement as a meaningful limitation upon disclosure, it is clearly unsound.

The critical language, "preliminarily to or in connection with a judicial proceeding," has been frequently construed. The decisions reject the government's position. The overwhelming majority of courts sensibly require the government to show a high probability that specific litigation will occur[10] in order to justify disclosure as preliminarily to a judicial proceeding. And that requirement can rarely, if ever, be met in the context of an IRS civil tax audit, for only one out of every hundred civil tax examinations ever results in the commencement of litigation,[11] and only the taxpayer, not the government, has the power to initiate a judicial proceeding.

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[10] The courts have articulated a variety of tests to assist in finding the requisite high probability and specificity of impending litigation. These tests are listed and analyzed by Judge Churchill in the *General Motors* case, 506 F. Supp. at 1178-81. Judge Churchill concluded that under none of those tests would a tax audit be a matter occurring "preliminarily to or in connection with a judicial proceeding."

In addition to the Seventh Circuit's rejection of the Government's position in *Baggot,* the Third, Fifth, Eighth and District of Columbia Circuits have rejected the argument that an administrative proceeding can be considered as occurring "preliminarily to" a judicial proceeding. *In re Grand Jury Proceedings,* 309 F.2d 440 (3d Cir. 1962); *In re J. Ray McDermott & Co.,* 622 F.2d 166 (5th Cir. 1980); *Bradley v. Fairfax,* 634 F.2d 1126 (8th Cir. 1980); *United States v. Bates,* 627 F.2d 349 (D.C. Cir. 1980). Two district courts reached the same conclusion as the Seventh Circuit did in *Baggot* in the context of an IRS civil audit. *In re 1978-80 Grand Jury Proceedings,* 503 F. Supp. 47 (N.D. Ohio 1980); *In re April 1977 Grand Jury Proceedings,* 506 F. Supp. 1174 (E.D. Mich. 1981). Numerous district courts have rejected the government's position in cases involving other administrative bodies; *e.g., In re Grand Jury Matter,* 495 F. Supp. 127 (E.D. Pa. 1980); *United States v. Young,* 494 F. Supp. 57 (E.D. Tex. 1980); *In re Proceedings Before the Federal Grand Jury for the District of Nevada,* 487 F. Supp. 1098 (D. Nev. 1980); *In re Grand Jury Investigation of Uranium Industry,* 1979-2 Trade Cases (CCH) ¶ 62,798 (D.D.C. 1979).

Every court which has considered the government's position with the benefit of adversary argument has refused to relax the prevailing rules of grand jury secrecy for the convenience of administrative agencies. The government is forced to rely upon two decisions rendered in *ex parte* proceedings where no advocate was heard in opposition to the government's position.[12] *In re Judge Elmo B. Hunter's Special Grand Jury,* 667 F.2d 724 (8th Cir. 1981); *In re December 1974 Term Grand Jury Investigation,* 449 F. Supp. 743 (D. Md. 1978). The district court decision in Maryland was specifically disapproved in *United States v. Bates,* 627 F.2d 349, 351 n. 1 (D.C. Cir. 1980). Both *ex parte* decisions gave insufficient weight to the strong policies opposing routine disclosure of grand jury materials.

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[11] Appendix B hereto is a table prepared from data published in the 1978-1981 editions of the IRS Annual Report issued by the Commissioner of Internal Revenue, Department of the Treasury, showing the number of examinations conducted by the IRS and the number of judicial cases involving the Litigation Division of the IRS commenced in each year.

III. THE PHRASE "PRELIMINARILY TO A JUDICIAL PROCEEDING" SHOULD NOT ENCOMPASS ADMINISTRATIVE PROCEEDINGS SUCH AS AN IRS AUDIT.

This Court in *United States v. Procter & Gamble Co.,* 356 U.S. 677, 681-82, restated the long-established policy that maintains the secrecy of grand jury proceedings. Its purpose is:

> . . . . to encourage all witnesses to step forward and testify freely without fear of retaliation. . . . The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow.

Nevertheless, the government seeks to subordinate the nation's strong interest in an effective criminal justice system to the IRS' interest in expediting civil tax audits. The government argues that disclosure of grand jury materials to the IRS for use in an administrative tax audit does not compromise grand jury secrecy any more than disclosure of grand jury materials to prevent an injustice in a judicial proceeding. The government also claims that the decision below could impede enforcement of the federal tax laws because it could cause the IRS to be unable to collect a deficiency in some instances where the IRS is generally aware of a tax delinquency but cannot obtain the information needed to establish and prove the liability by any means other than disclosure pursuant to Rule 6(e). These arguments assume that the collection of tax deficiencies and administrative convenience and efficiency are the dominant public policy interests at stake here.

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[12] The government also obtained by *ex parte* proceedings a disclosure order in *In re Grand Jury Matter,* 495 F. Supp. 127 (E.D. Pa. 1980), but when the court later held an adversary hearing upon reconsideration, the court vacated the disclosure order and recognized that proceedings by administrative agencies do not ordinarily constitute matters "preliminarily to a judicial proceeding."

The government's position can be restated as follows: When the IRS assigns its Agents to assist a grand jury investigation, the IRS should be ultimately permitted to use the information obtained by the grand jury, with all of its special powers and conditions — including the knowledge, analysis and evaluation of that information by the IRS agents — to audit tax returns. Requiring the IRS to audit tax returns and determine deficiencies using its own powers is, the government argues, inefficient. But the policy favoring collection of taxes cannot override the ancient policy of grand jury secrecy, which is "older than our Nation itself" and "compelling when viewed in the light of the history and *modus operandi* of the grand jury," *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399. Indeed, the grand jury as an institution, including its "indispensible" secrecy, "is part of the federal constitutional system," *United States v. Johnson*, 319 U.S. 503, 513. Congress acted to preserve the grand jury as an institution by limiting participation of agency personnel in grand jury investigations to the role of assisting the enforcement of "federal criminal law."

The government's "public policy" argument supporting disclosure for tax collection purposes ignores the long-term interests of society in favor of its own present desires. The interest in collecting tax revenue can be easily identified because the motion for disclosure is made as to a specific taxpayer. On the other hand, the criminal justice interests relate not only to the specific grand jury involved, but also to the effectiveness and the integrity of future grand jury investigations. The efficacy of a grand jury in a criminal investigation may well be adversely affected if grand jury testimony is generally available to government agencies upon request and witnesses are so advised. In addition, when the true purpose of a grand jury is to collect evidence for use in auditing tax returns, the grand jury procedure has been seriously abused.

The Government greatly overstates its need for grand jury material and greatly understates the ability of the IRS to conduct efficient and productive tax audits through lawful methods authorized by Congress. Congress has always provided the IRS with broad powers to conduct civil tax audits and maximize revenue collection. In a joint investigation, Special Agents from the IRS Criminal Investigation Division have the power under I.R.C. § 7608 to issue compulsory process and to execute and serve search warrants. In an ordinary civil tax audit, IRS agents have broad summons powers under I.R.C. § 7602, § 7603 and 7609 and have the right "to examine any books, papers, records, or other data which may be relevant or material" in determining tax liability (I.R.C. § 7602(1)). Congress has considered these extraordinary powers both necessary and sufficient for revenue collection purposes; if it had wished the IRS additionally to have wholesale access to secret grand jury material, it would not have written Criminal Rule 6(e) the way it did.

Congress recently enhanced the IRS's ability to obtain prompt access to documents of a taxpayer in the hands of third parties. Responding to IRS complaints that prior procedures were too cumbersome and encouraged delay, Congress enacted § § 331 and 332 of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"). It amended I.R.C. § 7609 to place the burden on the resisting taxpayer to initiate litigation to quash the summons, and it required the third party recordkeeper to assemble the requested documents and be prepared to produce them to the IRS promptly. It further required that the federal courts accelerate the hearing of all proceedings to enforce summonses and any resulting appeals. TEFRA § 331(h)(3).

In the same legislation, Congress responded to IRS complaints that excessive litigation as to the validity of civil summonses issued in matters which might also result in criminal prosecution was impeding IRS' ability to enforce civil summonses promptly. Congress amended I.R.C. § 7602 and established a clear rule that the IRS may not issue or enforce summonses if a Justice Department referral is in effect as to the matter, but may issue and enforce summonses prior to any criminal referral and after the final disposition of the criminal aspects. TEFRA § 333. Congress modified the doctrines established in *United States v. LaSalle National Bank*, 437 U.S. 398, in order to create a bright line test for IRS use of summonses, thereby minimizing litigation and the resulting delay, and enhancing IRS's capacity to collect revenue.

Using the considerable investigative tools available for examining tax returns and determining deficiencies, IRS agents can proceed, without a 6(e) order, to obtain the relevant documents and question the knowledgeable persons in order to determine the correct tax liability of the taxpayer. Hence, the real underlying policy interest relating to taxation is not the collection of tax deficiencies; it is whether the IRS can obtain benefit for its own administrative proceedings by assigning IRS personnel to assist grand juries. The government argues that the IRS will simply not wish to assign agents to assist the grand jury unless they can return to the IRS with the grand jury information.

Whether such information is retained in memoranda or merely in the minds of the agents that assisted the grand jury, the IRS expects that when it invests a certain number of man-hours in a grand jury investigation it is entitled to a return on its investment through subsequent use in civil tax determinations.[13] As a matter of public policy, at most this is an argument that the IRS should be spared the expense involved in utilizing its authorized statutory powers whenever a grand jury has been conducted.

In contrast, this Court has noted that strong public policies cause grand jury proceedings to be conducted in secret. Some relate to the specific proceeding involved, and some relate to the integrity of grand jury proceedings in general. This Court has shown concern as to the adverse effect of disclosure upon the testimony of witnesses in future grand jury proceedings. *United States v. Procter & Gamble Co., supra.* If grand jury testimony could be disclosed in connection with all administrative proceedings which occur after the conclusion of the grand jury proceeding, it is inevitable that members of the public would become more and more reluctant to testify freely and fully before a grand jury.[14] To the extent that grand juries would have difficulty in ascertaining the facts, they would be hindered in properly performing their function. Routine disclosure of matters occurring before grand juries, therefore, would tend to undermine the fact-finding effectiveness of the grand jury process.

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[13] General Motors has made a continuing offer to permit the civil audit agents to examine the duplicate copies of all the documents General Motors submitted to the grand jury, which are currently indexed by grand jury subpoenas and by specific demands within each subpoena. In this regard, General Motors also offered to provide an affidavit that when original documents were being photocopied three copies were made at the same time; that one went to the grand jury, one to a GM control set and one to a GM working set; and that the GM control set has been kept intact in precisely the same order and content as the submission of documents to the grand jury. The government rejected the offer because it wants the audit agents to have to review only the documents selected for them by the agents and attorneys who assisted the grand jury. In addition, the government wants the audit agents to have the current assistance of the grand jury agents plus their written memoranda analyzing the documents and testimony presented to the grand jury.

Furthermore, such disclosure for administrative purposes would inevitably lead to abuse of the grand jury process. Because the grand jury must be able to determine whether there is probable cause to believe that crimes have been committed, the grand jury has extraordinary powers. If these powers are available to persons in the government responsible for civil administrative matters, it is foreseeable that they will be used for such purposes, and Judge Churchill foresaw this potential for misuse in deciding the *General Motors* case. Judge Churchill had before him the following standard sentence inserted by the IRS in the letter recommending to the Department of Justice that a grand jury investigation be conducted:

> At the appropriate time we will request that an order be sought from the Court authorizing the disclosure of grand jury information to IRS under the provisions of Rule 6(e) of the Federal Rules of Criminal Procedure.[15]

Obviously, if every criminal tax investigation is relevant to a civil tax examination, and if the IRS can obtain a 6(e) order following each grand jury investigation, the secrecy of grand jury proceedings in tax matters will have been abandoned.

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[14] Instead of advising clients called to testify before a grand jury that their testimony will not be revealed beyond the grand jury room, careful counsel would have to advise their clients that their testimony may be made available to administrative agencies upon request at the conclusion of the grand jury investigation.

[15] Transcript, *supra* note 4, at page 10.

Judge Churchill said [App. A-1] he believed the government conducted the grand jury proceeding in good faith, but he added that he also believed the government personnel were:

> very, very conscious of the great potential, even the likelihood that the day would come when they would be seeking this information for civil purposes. I think that the potential for abuse even when there is a good faith general prosecution is absolutely tremendous.

Judge Churchill recognized that the government's position, if adopted, would inevitably lead to the convening of grand juries for administrative convenience:

> I think that 6(e) must be construed in light of the fact that 6(e) was adopted to prevent the grand jury material from being used for an improper purpose and if it could be used for Internal Revenue Service purposes there isn't any reason in the world why in case, after case, after case there couldn't be grand jury investigation of large corporations under these circumstances, all in good faith because almost every, you can always make an argument that there is a criminal potential every time there is a tax problem; not always but often, and it would be almost impossible to sort out. [App. A-2]

Regarding the basic issue of whether an IRS audit occurs preliminarily to a judicial proceeding, Judge Churchill said [App. A-3]:

> [C]onstruing 6(e) in light of the purposes of it and in light of the potential for abuse of grand jury proceedings, I am willing to say an audit, as a matter of law, per se, is not preliminary to a judicial proceeding . . .

Judge Churchill also predicted that improper use of grand juries would inevitably result from a holding that an IRS audit is preliminary to a judicial proceeding:

> [H]uman nature being what it is I made a prediction once I said you will be back and I will also make another prediction with even greater confidence, sooner or later, sooner or later, perhaps sooner, there will be grand jury proceedings brought by somebody, initiated by somebody within the government, and the reason for doing it is to get information for civil purposes.
>
> I'm not talking about these gentlemen or the good faith of Mr. Piliaris in this case, I am saying it's a big government and the tax collectors like to collect taxes. They like to do it the easy way and the potential, the temptation is going to be overwhelming. "Let's bring a grand jury proceeding. Let's bring this all together. If we indict them, fine, if we don't indict them, fine. If we don't when we get all through we have the whole case made in a handbasket."
>
> That just terrifies me. I don't think that is right. If I am wrong I will be reversed somewhere along the line but I really and sincerely feel it would be an abuse of Rule 6(e). [App. A-5]

Nowhere in Rule 6(e) is the interest of grand jury secrecy balanced against the interest in examining tax returns and determining deficiencies. Congress specifically limited the use of IRS personnel in grand jury proceedings to the enforcement of federal criminal law. In this case, the strong public policies behind grand jury secrecy are being attacked solely for the goal of administrative convenience. To protect the integrity of the grand jury process, and to avoid subjecting the public to unnecessary and unwarranted grand jury investigations, this Court should reject the government's request for an unwarranted expansion of the phrase "preliminarily to . . . a judicial proceeding" to include an administrative tax examination by the IRS.

IV. THE SCOPE OF "PRELIMINARILY TO . . . A JUDICIAL PROCEEDING" IN RULE 6(e)(3)(C)(i) IS CLEARLY NOT BROAD ENOUGH TO INCLUDE CIVIL TAX AUDITS.

The phrase, "preliminarily to or in connection with a judicial proceeding" has been part of Rule 6(e) since this Court first promulgated the Federal Rules of Criminal Procedure in 1946. In general, Rule 6(e) has always provided that grand jury proceedings must be kept secret unless disclosure is permitted under a stated exception, such as the "judicial proceeding" exception. A venerable rule of statutory construction requires that exceptions to a general rule be narrowly construed.[16]

But even without the rule of "strict construction," the government's loose interpretation must fail because, as a matter of logic, semantics and common sense, "preliminarily to" means a preparatory step leading to and immediately preceding "a judicial proceeding."

The government argues that "preliminarily to," if construed in this logical and sensible way, would have no utility in the tax area, but that the IRS needs the grand jury material to determine possible tax deficiencies. Therefore, the government asserts that the meaning contemplated by "preliminarily to . . . a judicial proceeding" includes, in the context of IRS activities, the audit activity of IRS agents. This interpretation of "preliminarily to" is necessarily based on the government's premise that an IRS audit is a preparatory step to a lawsuit.

---

[16] This rule of construction was applicable at the time Rule 6(e) was originally promulgated, as seen in this passage from *Hartford Electric Light Co. v. Federal Power Com.*, 131 F.2d 953, 962 (2nd Cir. 1942):

> [W]e consider as pertinent the 'elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed * * *.' Spokane & Inland R.R. v. United States, 241 U.S. 344, 348, 350 . . .

To the contrary, the instructions provided by the Internal Revenue Service to IRS agents state that the audit of a tax return is not, and is not intended to be, a preparatory step to a lawsuit. The Internal Revenue Manual states:

> The purpose of auditing a tax return is to determine the taxpayer's correct tax liability -- no more or no less. IRM 4015.1(3)

In General Standards issued to IRS agents for conducting an audit, the first standard listed is as follows:

> (1) The examiner has a responsibility both to the taxpayer and to the government to determine the correct tax liability and to maintain fair and impartial attitude in all matters relating to the examination. IRM 4015.3

The above instructions to the IRS agents are consistent with the following statement in the Internal Revenue Manual regarding the goal of the IRS:

> The mission of the Service is to encourage and achieve the highest possible degree of voluntary compliance with the tax laws and regulations and to conduct itself so as to warrant the highest degree of public confidence in its integrity and efficiency. IRM 4015.1(2)

These provisions in the Internal Revenue Manual establish that the IRS itself recognizes that a civil tax audit is merely a preparatory step to an administrative determination of the correct tax liability and is not a preparatory step to litigation.

A judicial proceeding follows a civil tax audit only at the election of the taxpayer, and only after the audit and administrative review process fail to produce the desired settlement. Until then, there is no cause of action – the essential foundation for a judicial proceeding. As the statistics in Appendix B show, only one in a hundred examinations ever results in litigation.

Contrary to the assertions at page 10 of the government's brief, the tax determination, assessment and collection process is not "designed to culminate" in litigation. It is designed to culminate in an administrative order which has the force of a final judgment without any resort to the courts. This Court noted in *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352 n. 18, the long-standing line of decisions upholding "the right of the government to collect taxes by summary administrative proceedings" in which "a tax assessment 'is given the force of a judgment, and if the amount is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.'"

The argument that an IRS audit and an IRS appellate conference are actions in anticipation of litigation was rejected in a civil tax refund suit in which the taxpayer sought discovery of IRS field agent reports and IRS appellate conferee reports. In *Peterson v. United States*, 52 F.R.D. 317, 320-21 (S.D. Ill. 1971), the government objected to such discovery on the grounds, among others, that such documents were prepared in anticipation of litigation or for trial and, therefore, were not discoverable under Federal Rule of Civil Procedure 26(b)(3). The court allowed discovery, holding that audit reports and appellate conference reports are not trial preparation material because "relatively few" audits "result in litigation," and because the purpose of an audit is to determine the correct tax to be assessed, if any.

The government lost the same issue again in *Abel Investment Company v. United States*, 53 F.R.D. 485 (D. Neb. 1971).

Both *Peterson* and *Abel Investment* were recently cited with approval in *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982). These cases are strong support for the proposition that IRS audits do not occur "preliminarily to a judicial proceeding," since documents related to IRS appellate conferences, which are several stages closer to possible litigation than IRS audits, were held not to be not prepared in anticipation of litigation. Moreover, the "anticipation of litigation" test for discovery is considerably broader in scope than "preliminarily to . . . a judicial proceeding."

In summary, "preliminarily to . . . a judicial proceeding" should be interpreted to mean the period immediately preceding the commencement of litigation during which preparatory steps are being taken to commence a judicial proceeding to resolve an existing case or controversy. This limited scope would be consistent with the general policy of maintaining the secrecy of grand jury proceedings.

CONCLUSION

The government in this case and in the *Sells* case seeks a result which allows grand jury material to be funneled to administrative agencies upon request at the conclusion of a grand jury investigation. This is contrary to the express intent of Congress and the drafters of the 1977 amendments to Rule 6(e). It threatens the integrity and independence of grand jury proceedings because it invites abuse of the grand jury process, and would contravene the principle expressed in *Douglas Oil*, 441 U.S. at 222, that grand jury secrecy may be breached only when necessary "to prevent a possible injustice in another judicial proceeding."

The judgment of the court below should be affirmed.

Respectfully submitted,

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November 12, 1982

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:) Misc. No.
April, 1977 Grand Jury) 77-144
(General Motors Corporation))

Government's Motion to Release Grand Jury Documents to Internal Revenue Service, before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan on Friday, December 19, 1980.

* * * * * *

THE COURT: I feel that the issue that is before the Court is important and probably important enough to merit, probably important enough to merit a publicized written opinion, but my primary concerns are the litigants here now in this case. I have been working hard on this case. I read your briefs. I spent a lot of time with them, I listened to your arguments. I can't do any better, maybe I can write an opinion later, and will, but I am going to tell you right now what my decision is because I made up my mind.

I am going to deny your motion. I will give the reasons for it and I will expand this somewhat. First, I am satisfied and have been satisfied all the way along that the government's grand jury proceedings were in good faith. I am not making any contrary finding now.

But, I also believe that they were also very, very conscious of the great potential, even the likelihood that the day would come when they would be seeking this information for civil purposes. I think that the potential for abuse even when there is a good faith general prosecution is absolutely tremendous. We are talking about where does this all come from? It all stems from a Fifth Amendment requirement. It says no person shall be held to answer for a capital or otherwise infamous crime unless upon the presentment or indictment of a grand jury, and so forth.

And without being absolutely accurate about this the general thrust of all the original Bill of Rights was to protect the people from abuse by government, not give the government power to abuse the people.

If there is any one power or rule set forth in the Bill of Rights in which there is a potential for the abuse of the people it's in the grand jury proceeding. The grand jury proceeding is just as good and no better than the good faith of the Justice Department or United States Attorney for the government, if you will, that are conducting the proceedings and we all know there have been times in these United States perhaps, even not so far from here, in which there has been abuses of grand jury power.

I am not saying that was the case here. I don't believe it was the case here but the potential for it is absolutely very, very great. I have that in mind here when I construe 6(e) and when I read the Supreme Court decisions and the other decisions that bear on this issue.

I think that 6(e) must be construed in light of the fact that 6(e) was adopted to prevent the grand jury material from being used for an improper purpose and if it could be used for Internal Revenue Service purposes there isn't any reason in the world why in case, after case, after case there couldn't be grand jury investigation of large corporations under these circumstances, all in good faith because almost every, you can always make an argument that there is a criminal potential every time there is a tax problem; not always but often, and it would be almost impossible to sort out.

I looked at these words very carefully. It says, "preliminary to or in connection with a judicial proceeding." I think that if there is a judicial proceeding it ought to be "preliminary to a judicial proceeding" that is to be commenced by the party seeking it or has been commenced by another party against it.

An audit is not a judicial proceeding. I am willing to say that under any circumstances I know about. An audit will not be a preliminary proceeding and cannot be a preliminary proceeding because the government doesn't have it within its power to bring a lawsuit to collect its taxes, to assess its taxes. The government's power is so overpowering now that it can just levy an assessment then the other party has to go into court to fight it.

You could have developed a system where the government had to go to court to prove somebody owed it taxes but it wouldn't be very practical. Congress gave the Internal Revenue Service the power to establish the tax and then say to the taxpayer, "If you don't like it you sue."

If I were to say, and I'm not looking at it in this particular case, I find it impossible to say there will or will not be eventually a lawsuit over this situation, I think it would be an absolutely unworkable rule to look at the history of the parties as you suggested and say. "Well, in this case there is likely to be a lawsuit, and probably in another case there won't be," because nobody in the world knows whether there will be or won't be in a given case.

You cited some absolutely good reasons why it is likely to be settled somewhere along the line, but I can't be absolutely sure of that. Somebody can get stubborn. You can get stubborn or he can get stubborn or get mad and things fall apart and a lot of them go to court. A lot of taxpayers go to court. A judicial proceeding by a taxpayer is possible but construing 6(e) in light of the purposes of it and in light of the potential for abuse of grand jury proceedings, I am willing to say an audit, as a matter of law, per se, is not preliminary to a judicial proceeding and that really would extend the inquiry.

I am supported in that by my view, I don't find any case that realy dealt with it that is absolutely controlling. The Ohio case, I forget the judge

MR. MOSCARINO: Contie.

THE COURT: I respect his opinion but it was ex parte and he probably didn't, while I respect his opinion I'm not following it in any sense of the word, I just agree with it. My opinion is consistent with it but he didn't have the opportunity to examine it probably as carefully as I am because he didn't have the benefit of the adversary process in arriving at it.

The same thing with the Rhode Island court. I don't think the Rhode Island judge really examined it. It was assumed by him, apparently, that it was preliminary to a judicial proceeding and to that extent it is a precedent. But I don't find any case anywhere that is binding on this Court. I think I am free to make the decision one way or the other. I feel supported in this by language in Douglas, this very language about the parties must show the material they seek is needed to avoid possible injustice in another judicial proceeding if the need for disclosure is greater than the need for continued secrecy, and so forth.

For that matter the Douglas case is a decision by the Supreme Court that they are going to put some brakes on this grand jury disclosure.

As far as whether or not the particularized need requirement, if that is what it is called or whether there is a double standard for the government and others, I can see a great deal more reason if you are going to apply a double standard to apply it the other way around, to put a heavier burden on the government than taxpayers for two reasons. For one thing, we must not forget it's the same government that brings the grand jury proceeding in the first place and if they know they can get it inevitably, if I rule the other way or if I am reversed on this decision, if it goes further or ultimately whether it is in this case or some other case, it's determined I'm wrong in this respect and it's determined an audit is preliminary to a judicial proceeding, human nature being what it is I made a prediction once I said you will be back and I will also make another prediction with even greater confidence, sooner or later, sooner or later, perhaps sooner, there will be grand jury proceedings brought by somebody, initiated by somebody within the government, and the reason for doing it is to get information for civil purposes.

I'm not talking about these gentlemen or the good faith of Mr. Piliaris in this case, I am saying it's a big government and the tax collectors like to collect taxes. They like to do it the easy way and the potential, the temptation is going to be overwhelming. "Let's bring a grand jury proceeding. Let's bring this all together. If we indict them, fine, if we don't indict them, fine. If we don't when we get all through we have the whole case made in a handbasket."

That just terrifies me. I don't think that is right. If I am wrong I will be reversed somewhere along the line but I really and sincerely feel it would be an abuse of Rule 6(e). I could even make an argument — I'm not adopting it — that to construe it the way the government wants to construe it in this case would be unconstitutional and inconsistent with the purposes of a grand jury because, you see, when we set up a grand jury and deny the people a right to go before a grand jury, that is with counsel, it's because of the peculiar constitutional nature of the grand jury. It's too indict, not for any other purpose.

If the rules are construed to give the government the right to use it for other purposes then probably the manner in which we conduct grand juries in many respects is unconstitutional because we are allowing the government to collection information they can use in civil proceedings whether it's tax cases or antitrust cases or a million other kind of proceedings that agencies might bring.

I am sure that in this particular case whether there is a particularized need or not that the government could very well, will be very well able to show that there is a great need for this from an economic, logistic point of view, that this material would be very, very valuable, would save them thousands and thousands of dollars, thousands and thousands of hours of time. It might even be the difference of millions, it might make 100-million dollars in taxes down the line. I'm not concerned with that.

I don't care whether General Motors owes them 100-million dollars or two cents. That issue isn't before me. The issue before me is as to whether or not we are going to allow the grand jury material to be turned over to auditors. The answer of this Court is No.

Whether I will ever bother writing an opinion or not I don't know. I might or I might not. I have three criteria for doing it. One is that it's something that might contribute to jurisprudence. Two is that there are no other cases, and three, is that the third criteria is that I am tolerably satisfied that I am right and I think the case meets all three criteria, so I will probably write an opinion.

Whether I make an order before I write the opinion or whether I will wait and write an opinion and then make an order I don't know. There isn't any particular hurry for an opinion. One of my colleagues didn't file an opinion one time until she had been reversed by the Sixth Circuit. She didn't like what they said so she filed her opinion. It's not a bad way to do because she is on the Sixth Circuit.

MR. FORREST: Two matters. Would the Court consider our alternative arguments with respect to the documents and also, is the court's denial of the motion without prejudice to being renewed should there be a judicial proceeding?

THE COURT: It's without prejudice in that respect. I can't possibly prejudge it. Somewhere along the line there may be a judicial proceeding and somebody may want it preliminary thereto.

Conceivably — here's the way it might come up — preliminary to a judicial proceeding, this is just imagination but you might, you may assess a tax and General Motors may come in here and file a petition to get this grand jury material because they need it because some witness is dead or something else, they need it to prepare their complaint. That would be preliminary to a judicial proceeding because it would be the parties that want to bring this judicial proceeding that is seeking the information. That is just purely speculative.

A lawsuit may start and some of this evidence may be gone. Clearly this isn't an absolute rule later. As far as the issue of what you can do and what you can't do with those documents, all I am ruling right now is because it's all I have before me is that I will not make a 6(e) order with respect to those documents. What you feel you can do without a 6(e) order I don't know.

If the Court has placed any restrictions upon you, did it go beyond what was necessary, you might want to file a petition. Today you are seeking a 6(e) order pure and simple, nothing else. That is all your motion was for.

MR. FORREST: Yes, your Honor.

THE COURT: All I am deciding is you can't get a 6(e) order of any kind because this is not preliminary to a judicial proceeding. Therefore, I can't grant the order that you seek. If you want some order that is outside 6(e), file a motion for it and we will have another hearing.

I enjoyed you folks immensely. We will be back together some day. Thank you.

MR. MOSCARINO: Thank you, your Honor.

MR. FORREST: Thank you.

CERTIFICATE

I, Donald E. Miller, Official Court Reporter, hereby certify I reported in shorthand the proceedings had in the within-entitled matter before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan on Friday, December 19, 1980, and that the foregoing is a full, true and correct transcript of my shorthand notes taken at said time and place.

DONALD E. MILLER
853 Federal Building
Detroit, Michigan 48226
226-3680

Dated: December 23, 1980

APPENDIX B

	Fiscal Year			
	1978[1]	1979[2]	1980[3]	1981[4]
IRS examinations/corrections conducted at:				
District office	1,431,169	1,394,394	1,368,553	1,211,690
Residence/business	728,253	679,302	615,671	557,084
Service centers	169,390	199,907	195,073	161,518
Total	2,328,812	2,273,603	2,179,297	1,930,292
IRS Tax Litigation Division				
Tax litigation received in:				
Tax Court[5]	13,284	16,995	20,660	29,512
District Court	817	915	736	848
Court of Claims	212	165	162	223
Total	14,313	18,075	21,558	30,583
Ratio of litigation received to examinations made	.006	.008	.01	.016

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[1] Commissioner of Internal Revenue, 1978 Annual Report; pp. 24, 59, 60.

[2] Commissioner of Internal Revenue, 1979 Annual Report; pp. 15, 41, 42.

[3] Commissioner of Internal Revenue, 1980 Annual Report; pp. 25, 47, 48.

[4] Commissioner of Internal Revenue, 1981 Annual Report; pp. 12, 77.

[5] Includes "small tax cases" defined as cases involving deficiencies of $1,500 or less.

Amicus Brief

2

No. 81-1938

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES E. BAGGOT,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF OF FRED WITTE, B&W INVESTMENTS AND CENTER GLASS COMPANY NO. 3 AS *AMICUS CURIAE* URGING AFFIRMANCE

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and CENTER GLASS CO. NO. 3

INTERIM PRINTING & MAILING COMPANY
[illegible]

TOPICAL INDEX

Page

INTRODUCTION 1

INTEREST OF THE *AMICUS CURIAE* 2

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. CONGRESSIONAL INTENT TO LIMIT THE APPLICATION OF THE DOCTRINE OF GRAND JURY SECRECY MUST BE EXPRESSED IN CLEAR AND UNEQUIVOCAL TERMS 3

A. History Of The Grand Jury And The Rule Of Secrecy 3

B. The Investigative Powers Of The Grand Jury v. The Investigative Powers Of The IRS 6

C. Congress' Derogation Of The Common Law Principle Of Grand Jury Secrecy Must Be Narrowly Interpreted 8

II. PUBLIC POLICY CONSIDERATIONS WOULD REQUIRE READING RULE 6(e)(3)(C)(i) TO PROHIBIT A COURT ORDER DIRECTING DISCLOSURE OF GRAND JURY MATERIALS TO THE IRS FOR A CIVIL TAX INVESTIGATION 10

A. The IRS Will Accede To Investigative Powers Not Granted To It By Congress 10

B. The Opportunity And Incentive For Parallel Investigation Increases Risks That Grand Jury Abuse Will Increase 11

C. The Ability To Detect Or Demonstrate Grand Jury Abuse Will Be Reduced Or Eliminated 12

TOPICAL INDEX (Continued)

Page

D. The Incentive For The IRS To Develop The Adversary Case On An *Ex Parte* Basis Would Be Increased 13

E. Breach Of Secrecy Will Inhibit Disclosure To The Grand Jury And Increase Fear Of Reprisal 14

III. THE INVITATION TO ABUSE OF THE GRAND JURY PROCESS WHICH WOULD BE ENTAILED IN THE GOVERNMENT'S INTERPRETATION OF RULE 6(e)(3)(C)(i) IS NEITHER SPECULATIVE NOR HYPOTHETICAL, BUT IN FACT HAS BEEN DEMONSTRATED ON VARIOUS OCCASIONS 15

CONCLUSION 18

TABLE OF AUTHORITIES CITED

Page

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Baker v. United States Steel Corp., 492 F.2d 1074 (2d Cir. 1974) 14

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Page

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In re Judge Elmo B. Hunter's Special Grand Jury, 667 F.2d 724 (8th Cir. 1981) 9

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Kastigar v. United States, 406 U.S. 441 (1972) 8

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Picking v. Pennsylvania R. Co., 151 F.2d 240 (3rd Cir. 1945) 9

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Page

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United States v. Johnson, 319 U.S. 503 (1942) 5

United States v. Mandujano, 425 U.S. 564 (1976) 7

United States v. Proctor & Gamble Co., 356 U.S. 677 (1958) 5,14

United States v. Scully, 225 F.2d 113 (2d Cir. 1955), *cert. den.* 350 U.S. 897 7

United States v. Sells Engineering, Inc., No. 81-1032 2,12

United States v. Smyth, 104 F.Supp. 283 (N.D. Cal. 1952) 8

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STATUTES

Internal Revenue Code,
  Section 7602 7
  Section 7602(a)(2) 5
  Section 7602(a)(3) 6
  Section 7604 7
  Section 7609 8

15 U.S.C.
  Section 49 7
  Section 78(u) 7

TABLE OF AUTHORITIES CITED (Continued)

Page

STATUTES (Continued)

18 U.S.C. Section 6002 8

26 U.S.C.
  Section 7602 7
  Section 7609 7

42 U.S.C. Section 1983 9

47 U.S.C. Section 409(e) 7

49 U.S.C. Section 1484(b) 7

RULES

Federal Rule of Criminal Procedure
  Rule 6(e) 2,3,8,14, 15,16,17
  Rule 6(e)(3)(A)(ii) 18
  Rule 6(e)(3)(C)(i) 2,3,9,10,18

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Abourezk, *The Inquisition Revisited*, 7 Barrister 19-20 (Wint. 1980) 7

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Note, "*Administrative Agency Access to Grand Jury Material Under Amended Rule 6(e)*," 29 Case Wes. Res.L.Rev. 295 (1978) 12

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Page

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The Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248) 8

No. 81-1938

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES E. BAGGOT,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF OF FRED WITTE, B&W INVESTMENTS AND CENTER GLASS COMPANY NO. 3 AS *AMICUS CURIAE* URGING AFFIRMANCE

INTRODUCTION

Amicus curiae intervenors Fred Witte, B&W Investments and Center Glass Company No. 3 (referred to as "Intervenors" herein), respectfully submit this brief as *amicus curiae* urging affirmance of the decision of the Court of Appeals for the Seventh Circuit. All parties to this case have consented in writing to Intervenors' participation as *amicus curiae*. Copies of the correspondence giving consent are filed with the Court concurrently herewith.

INTEREST OF THE *AMICUS CURIAE*

In 1973, Sells Engineering, Inc. was the subject of an administrative audit by the Internal Revenue Service ("IRS") which in 1974 was converted to a combined civil and criminal administrative investigation of that corporation, Intervenors and others. From January 1975 through May 1976, the IRS sought the production of records of Sells Engineering, Inc. and other entities, including Intervenors, by the issuance of administrative summons. After the District Court for the Southern District of California stayed enforcement of all of the summons pending appeals, the IRS commenced an open-ended grand jury investigation, which was conducted from August 1976 to November 1977.[1] In April 1978, a different grand jury returned an eleven count indictment which resulted in a negotiated plea of guilty by Peter Sells and Intervenor, Fred Witte, entered on December 15, 1978, to one count of conspiracy to commit tax fraud.

On June 5, 1980, the IRS petitioned the District Court for the Southern District of California, some eighteen months after the guilty plea, for release of grand jury materials pursuant to Federal Rule of Criminal Procedure 6(e) (referred to as "Rule 6(e)" herein). The alleged grounds for disclosure were that "disclosure of documents, materials and information developed in the grand jury investigation would avoid the time, expense and inconvenience to counsel, investigators, witnesses and the courts, that would be required to duplicate, in an administrative investigation, the information already assembled in the grand jury investigation."[2] The statutory basis relied upon by the United States for the disclosure of the foregoing was Rule 6(e)(3)(C)(i) on the grounds that the disclosure sought was "preliminary to a judicial proceeding." On June 23, 1980, the District Court granted disclosure of grand jury materials.

Intervenors and others appealed the decision of the District Court and the matter has been briefed and argued before the Ninth Circuit Court of Appeals (the "Ninth Circuit").[3] The Ninth Circuit has withheld its decision pending determination of the matters raised in this case and in *Sells I.* As of the date of this briefing, some nine years after the original tax investigation, no Notice of Deficiency for the payment of income taxes has been issued and served on Intervenors.

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[1] The foregoing is a synopsis of an extensive statement of the facts as recited in *United States v. Sells Engineering, Inc.*, U.S. Supreme Court Case No. 81-1032 (referred to herein as *Sells I*) presently pending before this Court and scheduled for simultaneous filing of the Brief of Respondents.

[2] Motion of the United States of America, in *In re Grand Jury Investigation, Peter A. Sells, et al.*, Grand Jury No. 78-184; Criminal No. 78-0279-GT (S.D. Ca. *filed* June 5, 1980) at 3.

[3] *In re Grand Jury Investigation, Peter A. Sells, et al.*, Case No. 80-5829 (9th Cir. *oral argument* March 3, 1982) (hereinafter referred to as *Sells II*).

Intervenors' litigation in *Sells II* presents a question identical to the question presented by the United States in the present case, *i.e.*, whether disclosure of matters occurring before a grand jury to the IRS for its use in conducting a civil tax investigation to determine liability and assess any tax deficiency constitutes disclosure directed "preliminarily to . . . a judicial proceeding" that may be authorized under Rule 6(e)(3)(C)(i). A resolution of the matters in this case will control the resolution of that question in Intervenors' litigation now pending in the Ninth Circuit. *Amicus curiae* are further interested in this case because it involves the question of whether government personnel must demonstrate a "compelling and particularized need" for disclosure under Rule 6(e)(3)(C)(i), which is an issue in *Sells I* before this Court and in *Sells II.*

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Seventh Circuit is supported in law by virtue of the following:

(a) The common law doctrine of grand jury secrecy is constitutionally embodied within the fifth amendment and any limitation of this doctrine must (i) not undermine the constitutional basis of the doctrine, and (ii) be made by clear and unequivocal expression of Congress.

(b) The existing case law which supports the decision below is sound for reasons of public policy relating to the role and purpose of the grand jury and its constitutional parameters as an investigative body vested with formidable powers of investigation and inquiry.

(c) An expansive interpretation of Rule 6(e)(3)(C)(i) as urged by the government is unreasonable and would be an invitation and incentive to grand jury abuse.

ARGUMENT

I. CONGRESSIONAL INTENT TO LIMIT THE APPLICATION OF THE DOCTRINE OF GRAND JURY SECRECY MUST BE EXPRESSED IN CLEAR AND UNEQUIVOCAL TERMS.

A. History Of The Grand Jury And The Rule Of Secrecy.

The institution known as the grand jury first dates back to the Assize of Clarendon issued by Henry II in Britain in 1166. Its initial purpose was to investigate criminal behavior on behalf of the Crown. In the late seventeenth century the role of the grand jury as a protector or "shield" against government abuses became predominant.[4] It was during this same time that the concept of grand jury secrecy evolved as a protection for its deliberations from abuses of the Crown.[5] In the early colonial days of America the role of the grand jury acting in secret as a "shield" against government abuses became predominant as a result of resistance to British authoritarian rule.[6] The result was the incorporation into the Bill of Rights as a part of the fifth amendment the provision guaranteeing a grand jury indictment before prosecution for infamous and capital crimes.[7] The fifth amendment protection of the grand jury as a "shield" against government abuses was early recognized in legal commentaries.[8]

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[4] M. Frankel, *The Grand Jury - An Institution On Trial*, 6-8 (1977) (hereinafter cited as "Frankel"); Note, *Administrative Agency Access to Grand Jury Materials*, 75 Col. L. Rev. 162, 163-164, at footnote 13 (1975) (hereafter cited as "Note, *Administrative Agency Access to Grand Jury Materials*").

[5] The hallmark case in England in 1681, which is hailed as initiating the grand jury as a shield against government oppression, was also the case that underlined the importance of grand jury secrecy. In this case two Protestants, Anthony, Earl of Shaftsbury, and Stephen Colledge, were under investigation by King Charles II for treason. Notwithstanding Charles II's pressure to have the grand jury hearing in public, the grand jury resisted and conducted the proceedings in private, resulting in a decision not to indict. M. Pickholz and J. Pickholz, *Grand Jury Secrecy and the Administrative Agency: Balancing Effective Prosecution of White Collar Crime Against Traditional Safeguards*, 36 Wash. & Lee L.Rev. 1027, 1029 (1979) (hereafter cited as "Pickholz").

[6] The requirement of indictment by grand jury has a history in Colonial America predating the constitution. The earliest documentary protection afforded by grand jury indictment (referred to as a "grand inquest") was contained in the New York Charter of Liberties (1683), Colonial Laws of New York (1894), Vol. 1, at 111-16; *reprinted in* 1 Schwartz, *The Bill of Rights: A Documentary History* (1971), (hereafter cited as "Schwartz"). The first constitutional guarantee of grand jury indictment was found in the North Carolina Declaration of Rights (1776) (*reprinted in* 1 Schwartz, 286). The use of the grand jury as a bulwark against British royal excesses was displayed in 1735 when the grand jury in New York refused to indict a newspaper editor for criminal libel, notwithstanding demands of the British Crown. J. Edwards, *The Grand Jury*, 32 (1906). The grand jury was highly esteemed when the colonies formed a nation, and in fact it had often been the clarion of anti-authoritarian, revolutionary sentiment directed against the British Crown. L. Clark, *The Grand Jury*, 19 (1975). While the Constitution of the United States as originally adopted did not contain a guarantee of grand jury indictment, the Bill of Rights, ratified by the states in 1791, did contain the present form Constitutional guarantee that appears in the fifth amendment. The present form of the amendment is actually in a form more protective than was originally presented by James Madison to Congress in 1789 (*See* 2 Schwartz, 1027, 1053, 1117, 1154, 1165).

[7] *"No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury . . ."* U.S. Const. Amend. V. cl. 1.

This Court has long recognized the constitutional purpose of the grand jury as in inquisitional institution of the people and a shield against the oppressor, the independence of which has been long assured by the common law doctrine of secrecy.[9] "The regular work of the ordinary grand jury is secret and unnoticed. Secrecy is a dark notion with Americans, usually for splendid reasons. But the secrecy of the grand jury is basically a good idea, as abused and perverted as it often is."[10]

This Court has enunciated the principles underlying grand jury secrecy in *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 n. 6 (1958) as follows: (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. *See also Dennis v. United States*, 384 U.S. 855, 868-870 (1966).

One of the unanticipated, but developing side effects of the erosion of the secrecy requirement is that it permits the grand jury to be diverted from its primary concern of investigating criminal activity.[11] Why this is such an attractive abuse becomes apparent upon an analysis of the vast difference in potency between the investigative powers of the grand jury on one hand and the discovery powers of administrative agencies such as the IRS on the other hand. The temptation of the Executive and its agencies to utilize the grand jury powers to a degree much greater than is necessary to secure an indictment is natural in view of the expansive powers of the grand jury and the ability to develop an *ex parte* case for subsequent use.[12]

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[8] *See, e.g.*, 3 Story, *Commentaries On The Constitution Of The United States*, 658 (1833).

[9] Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 n. 9 (1979); *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 (1958); *United States v. Johnson*, 319 U.S. 503, 513 (1942); *Costello v. United States*, 350 U.S. 359, 362 (1956); *Ex Parte Bain*, 121 U.S. 1, 11-12 (1886).

[10] *See* Frankel, *supra* note 4, at 23.

[11] *See* Note, *Administrative Agency Access to Grand Jury Materials*, *supra* note 4, at 166.

B. The Investigative Powers Of The Grand Jury v. The Investigative Powers Of The IRS.

The description of the investigative powers of the grand jury in superlative adjectives such as "extraordinary" and "awesome" is surely without hyperbole or exaggeration.[13] The breadth and scope of the grand jury subpoena power is all-encompassing. The grand jury need not demonstrate relevancy or materiality in enforcing its subpoenas. *United States v. Dionisio*, 410 U.S. 1, 9-14 (1972); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). Therefore, the grand jury is free to roam into the nooks and corners of speculation and privacy without any regard to relevancy. *United States v. Weinberg*, 439 F.2d 743, 749 (9th Cir. 1971). By contrast, the IRS rules of discovery permit the taking of testimony "as may be relevant or material to such inquiry." (I.R.C. § 7602(a)(3)). The materials which may be summoned are those which are "relevant or material to such inquiry." (I.R.C. § 7602(a)(2)).

The volume of documents requested or length of time involved will not provide a basis for refusing to enforce a grand jury subpoena which is unreasonable or oppressive. *In Re Grand Jury Subpoena Duces Tecum*, 203 F.Supp. 575 (S.D. NY 1961).[14] An excellent synopsis describes grand jury investigative powers as "awesome and virtually unlimited today."[15] This court has stated in *United States v. Calandra*, 414 U.S. 338 (1974) at 343:

> "The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials."

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[12] *See discussion*, Hassett, *Ex Parte Pre-Trial Discovery: The Real Vice of Parallel Investigations*, 36 Wash. & Lee L.Rev. 1049, 1065 (1979) (hereafter cited as "Hassett").

[13] *See e.g.*, Hassett, *supra* note 12, at 1051.

[14] *See Petition of Borden Co.*, 75 F.Supp. 857 (N.D. Ill. 1948), where the court upheld a grand jury subpoena for company records spanning 20 years, even though it had been shown that gathering the corporate records for 10 years pursuant to a prior subpoena took twenty-six men working for two months.

[15] Glanzer, *Grand Jury Investigations*, published in *American Bar Association National Institute On Parallel Grand Jury And Administrative Agency Investigations: The Criminal And Civil Implications For Corporations And Their Officers*, Tab E-3, 1 (1978), (hereafter cited as "*ABA National Institute*"). *See also*, *Id.* at Tab E-4.

By contrast, the subpoena power of agencies is often limited by statute (*e.g.*, 15 U.S.C. § 49 (FTC); 15 U.S.C. § 78(u) (SEC); 47 U.S.C. § 409(e) (FCC); 49 U.S.C. § 1484(b) (CAB); 26 U.S.C. §§ 7602 and 7609 (IRS)).[16] These subpoenas must be enforced in federal district court and an enforcement order is appealable (I.R.C. § 7604).

A further distinction between testimony before a grand jury and testimony pursuant to a civil summons is that before a grand jury a person has no right to counsel. *United States v. Scully*, 225 F.2d 113, 116 (2d Cir. 1955), *cert. den.* 350 U.S. 897. He does have such a right when called to produce documents or testify pursuant to a civil summons. The obvious purpose of this highly controversial and much criticized distinction is to provide a mechanism for maximum disclosure in the investigation of criminal activity. The absence of counsel in the grand jury room has been one of the most, if not the most, prominent targets of criticism of the grand jury system, including criticism by the American Bar Association.[17] The potential for intimidation of witnesses is obvious. The grand jury's questioning power is virtually limitless and includes private association and personal beliefs, even if not relevant to the investigation.[18] The present day grand jury inquisitional powers have been described as vestiges of a Star Chamber System.[19]

A witness appearing before a grand jury pursuant to subpoena need not be informed of the purpose of the subpoena or of the crime being investigated. *United States v. Mandujano*, 425 U.S. 564, 571-575 (1976); *W. Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972). By contrast, the purposes for the issuance of an IRS summons are limited to the determination of tax liability (I.R.C. § 7602).

Furthermore, the administrative summons is only a source of discovery to a limited class of persons, and when third persons are summoned to give records in connection with the investigated taxpayer, a special protective procedure must be followed, including notice to the taxpayer (I.R.C. § 7609). In its recent enactment of The Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248), Congress has expanded the powers of the IRS as they relate to investigation for tax purposes, but these expansions still fall far short of the breadth of the powers of the grand jury.

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[16] *See also*, Friedman, *Parallel Investigations: Interagency Sharing of Information and Freedom of Information Act Problems*, in *Parallel Grand Jury and Administrative Agency Investigation*, 816 (a Professional Education Publication in conjunction with the American Bar Association, Chicago, 1981).

[17] *See generally, Grand Jury Reform Act of 1978: Hearings on S. 3405 Before Subcomm. on Admin. Practice and Procedures of Senate Comm. on Judiciary, Parts I and 2*, 95th Cong., 2nd Sess. (1978), which contains an abundance of Law Review articles and other materials on the subject. *See also* Abourezk, *The Inquisition Revisited*, 7 Barrister 19 (Wint. 1980) (hereafter cited as "Abourezk").

[18] *See* Abourezk, *supra* note 17, at 20.

[19] Janofsky, *Association Proposes Grand Jury Reforms*, 66 A.B.A.J. 810, (July, 1980).

In testifying before a grand jury, a witness may be compelled to waive his fifth amendment right against self-incrimination if he is given "use" immunity. *Kastigar v. United States*, 406 U.S. 441 (1972); 18 U.S.C. § 6002. Not so in the testimony in the civil arena. A grand jury may conduct an investigation without a specific target in mind. *Hale v. Henkel*, 201 U.S. 43 (1906); *United States v. Smyth*, 104 F.Supp. 283, 287 n. 1 (N.D. Cal. 1952). The mere fact of investigation is sufficient to invoke all the powers of investigation, such as the subpoena power.

This court has condoned the use of such broad based powers by the grand jury on the grounds that "its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments. . . ." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). In contrast, the civil investigative powers of the IRS are subject to safeguards and limitations not otherwise applicable to grand jury investigative powers.[20]

C. Congress' Derogation Of The Common Law Principle Of Grand Jury Secrecy Must Be Narrowly Interpreted.

It is Intervenors' belief that the common law doctrine of grand jury secrecy is constitutionally embodied in the fifth amendment. Any refinement or limitation by Congress of this historic doctrine must not only meet the test of constitutionality but must be made by a clear and unequivocal expression of congressional intent. Having in mind (a) the long-tradition of the grand jury (b) the purpose of the grand jury secrecy, and (c) the resultant inquisitorial and instrusive powers granted to the grand jury, any tampering with this delicate balance in one aspect, must be measured in terms of its effect on the other aspects. Congress must be deemed to have had knowledge of the above. The interpretation which the United States seeks to place upon Rule 6(e) would result in an abrogation of a portion of that historic doctrine of secrecy.[21]

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[20] *See also*, Note, *Administrative Agency Access to Grand Jury Materials*, *supra*, note 4, at 178.

[21] It is ironic that while the Department of Justice seeks to increase the flow of information from the grand jury room, the General Accounting Office (GAO) has moved to restrict the flow. The GAO directly accused the Department of Justice with having failed to

(Footnote 21 continued on page 9)

Given the importance of this doctrine, exceptions to grand jury secrecy should be attributed to the Criminal Rules only where there has been a clear and unequivocal expression of intent to refine or limit such secrecy. Constitutionality aside, this approach invokes a traditional principle of construction that actions in derogation of the common law must be strictly construed.

For example, judicial immunity, like grand jury secrecy, predated the Constitution. When Congress enacted what is now codified as 42 U.S.C. § 1983, it provided for liability for "[e]very person" who acted under the color of state law to deprive another of his/her federal rights, privileges or immunities. Looking to the "face" of the statute, or applying a "plain meaning" rule, one might conclude that the "every person" language of § 1983 encompassed judges and that consequently they would be amenable to suit under that statute. Indeed, there was respectable authority for exactly that proposition. *Picking v. Pennsylvania R. Co.*, 151 F.2d 240, 250-251 (3rd Cir. 1945). Nevertheless, this Court held that the doctrine of judicial immunity was so well established that unless Congress "specifically" provided for its abolition, such immunity was not deemed to have been affected by the "every person" language of the statute. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

The provisions of Rule 6(e)(3)(C)(i) provide no clear statement of an intention to further curtail grand jury secrecy. The very fact that there is division among the Courts of the various Circuits indicates the lack of a clearly expressed Congressional intention.[22] With this being the case, it must be presumed that the traditional secrecy of the grand jury continues. Consequently, the judgment of the Seventh Circuit below should be affirmed.

(Footnote 21 continued)

adequately protect grand jury secrecy in a report issued October 16, 1980. The GAO report noted that the names of 343 grand jury witnesses were identified before indictments were returned, five of them were murdered, ten were intimidated and one disappeared. *See* Winer, *Grand Jury Disclosures Scored*, The National Law Journal, November 17, 1980, at 3, column 1; *and*, Winter, *Grand Jury Secrecy: Changes are Weighed*, 67 A.B.A.J. 144 (February, 1981).

[22] *Compare, e.g., In re Special February, 1976 Grand Jury (Baggot)*, 662 F.2d 1232 (7th Cir. 1981); *In the Matter of Grand Jury Proceedings, (Miller Brewing Company)*, Nos. 81-2077; 81-2115; 81-2407 (7th Cir. Sept. 3, 1982); *In re April 1977 Grand Jury Proceedings (General Motors)*, 506 F.Supp. 1174 (E.D. Mich. 1981), appeal pending, No. 81-1182 (6th Cir.); *In re 1978-1980 Grand Jury Proceedings, (Akron)*, 503 F.Supp. 47 (N.D. Ohio 1980); with *In re Judge Elmo B. Hunter's Special Grand Jury*, 667 F.2d 724 (8th Cir. 1981); *In re Grand Jury Subpoenas, April, 1978, at Baltimore*, 581 F.2d 1103 (4th Cir. 1978), *cert. denied sub nom. Fairchild Industries, Inc. v. Harvey*, 440 U.S. 971 (1979).

II. PUBLIC POLICY CONSIDERATIONS WOULD REQUIRE READING RULE 6(e)(3)(C)(i) TO PROHIBIT A COURT ORDER DIRECTING DISCLOSURE OF GRAND JURY MATERIALS TO THE IRS FOR A CIVIL TAX INVESTIGATION.

The Government contends that unless the IRS has virtual automatic access to grand jury materials, its program of civil tax enforcement will be disrupted (Petitioner's Brief, page 33). In fact, the Government's interpretation of Rule 6(e)(3)(C)(i) would lend itself to a use of the grand jury process by the IRS, and all of the grand jury's discovery powers, whenever the institution of a grand jury proceeding can be justified on some marginal basis. The doors of traditional grand jury secrecy are then blown open to the IRS to conduct a civil tax investigation and to use such grand jury materials as it sees fit.

A. The IRS Will Accede To Investigative Powers Not Granted To It By Congress.

Access to grand jury materials on the basis the Government maintains would permit the IRS to obtain information through the grand jury without utilizing conventional civil discovery methods that include civil discovery safeguards. In effect, this would permit the IRS to "accede" to and ride piggyback upon those broad, expansive and unchecked grand jury investigative powers described above (*see supra*, ARGUMENT I B).

To summarize these powers, the Ninth Circuit has stated in *In re J. R. Simplot Co.*, 77-1 U.S.T.C. (CCH) par. 9146, 86,195 (9th Cir. 1976), at page 86,198:

> "The taxpayer also has rights that are circumvented by civil use of grand jury material. Use of the grand jury means that the taxpayer is not entitled to notice as to any charges against him. The taxpayer's right to refuse to answer irrelevant questions is severely restricted. He has no right to have counsel before the grand jury, and his testimony can be compelled by grant of immunity. Also, a grand jury subpoena is not subject to the same limitations as a civil summons. Allowing civil use without an adversary hearing and without some strict showing of necessity would raise serious due process problems. As long as the target witness has not been indicted, he or she has no access to his or her own testimony. To allow government agencies access would create a serious inequity in grand jury procedures and would undercut the function of secrecy as a bulwark against unwarranted investigations."

To permit this accession would be contrary to the stated intention of Congress which has specifically built safeguards and restrictions on investigative powers of the IRS. This "accession" to power was expressed as a concern by witnesses testifying before the Hearings before House Subcommittee on Criminal Justice.[23] It would permit the "end-run" which the *Simplot* court denied.

B. The Opportunity And Incentive For Parallel Investigation Increases Risks That Grand Jury Abuse Will Increase.

The fact that agents of the IRS will work intimately with the Department of Justice attorneys conducting the criminal tax investigation lends itself to an atmosphere in which the direction of the grand jury investigation can be manipulated for civil purposes. The Government in its Brief, states correctly that it is not uncommon for the revenue agent who initiated the civil tax audit also to become an agent of the grand jury to assit in the criminal proceedings (Petitioner's Brief, page 34, note 28). This is precisely what happened in *Sells I.* The 1977 amendments to Rule 6(e) were directed at providing the Criminal Division of the Department of Justice with technical expertise and assistance in economic type crimes. The result, however, is that in these cases "virtually all the evidence amassed during the grand jury investigation has been gathered and analyzed by Internal Revenue Service agents." (Petitioner's Brief, pages 34-35). If this Court were to sanction the subsequent use of such grand jury-developed evidence for a subsequent civil tax investigation (which is what in effect the Government is asking) the temptation for Grand Jury abuse becomes evident. This will lead to the scenario where the initiation of a grand jury investigation, at the recommendation of the IRS, is commenced whenever the IRS becomes stymied using its own broad discovery powers and can make the argument that there is a *possibility* a crime may have been committed based upon its own subjective judgment. The General Motors *amicus curiae* brief in this case sets forth a factual situation where the district court concluded there probably would not have been a grand jury investigation if the IRS was not motivated to obtain civil discovery using the subpoena power of the grand jury (*See In re April 1977 Grand Jury Proceedings (General Motors)*, 506 F.Supp. 1174 (E.D. Mich. 1981) appeal pending No. 81-1182 (6th Cir.).

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[23] *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 92-93 (1977), at 152 (hereafter cited as "*Hearings*"). *See* Testimony of Terry Segal, *Id.*, at 19-20; District Judge Becker, *Id.*, at 33-34.

C. The Ability To Detect Or Demonstrate Grand Jury Abuse Will Be Reduced Or Eliminated.

The statement that the mere intrusive powers of the grand jury may not be used to benefit a civil investigation has been characterized as more fiction than fact.[24] This has been documented by numerous authors.[25] It is grossly difficult to show a grand jury was used solely for civil purposes and it has been said that "so long as there is a hint of possible criminal prosecution," the grand jury's purpose is vindicated.[26] But surely the breadth of the grey area between total civil use and total criminal use of the grand jury provides shadows for collusion between the civil and criminal functions which make after-the-fact challenges of motives and purpose a virtual impossibility.

"Even when the circumstances surrounding a grand jury investigation strongly indicate the deliberate misuse of the grand jury as a civil discovery mechanism, the courts appear reluctant to find bad faith absent a virtual admission by the government."[27] The dangers of overlapping use and intention are underlined by the Solicitor General's statement that related criminal and civil litigation often is assigned to a single IRS agent or group of IRS agents (Petitioner's Brief, page 34, note 28). The dual purpose of the use of the grand jury under such circumstances becomes axiomatic and self fulfilling.

If the IRS agent who initiated a civil investigation and who is responsible for the instigation of a criminal investigation is then allowed to develop the evidence he wants before the grand jury, and then wholesale it out for his civil investigation, it becomes virtually impossible to determine *bona fides* or *mala fides*. A formula for discovery will have been invented and one can only assume it will be often utilized as experience already demonstrates.[28]

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[24] *See* Hassett, *supra* note 12, at 1052.

[25] *See* Pickholz, *supra* note 5; *See also* Note, *Administrative Agency Access to Grand Jury Materials*, *supra* note 4, at 167 and Hassett, *supra* note 12.

[26] *See* Hassett, *supra* note 12 at 1052.

[27] Note, "*Administrative Agency Access to Grand Jury Material Under Amended Rule 6(e)*," 29 Case Wes. Res.L.Rev. 295, 310 (1978).

[28] *See e.g.*, *United States v. Sells Engineering*, No. 81-1032 (U.S. Supreme Court); *In re April 1977 Grand Jury Proceedings (General Motors)*, *supra* note 22; *Robert Hawthorne, Inc. v. Director of Internal Rev.*, 406 F.Supp. 1098 (E.D. Pa. 1976); *Sam Cohen*, 42 T.C.M. (CCH) 312 (1981); *In re Grand Jury Subpoenas, April 1978, at Baltimore*, *supra* note 22; *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956); *United States v. Doe*, 341 F.Supp. 1350 (S.D. N.Y. 1972).

D. The Incentive For The IRS To Develop The Adversary Case On An *Ex Parte* Basis Would Be Increased.

In a parallel investigation, the United States attorney presenting and examining witnesses before the grand jury in a tax case will be guided and directed by IRS agents who are the persons who amass and analyze "virtually all" of the government's evidence (Petitioner's Brief, pages 34-35). And if the government gets its way, these agents will be the same as those that have initiated the civil tax investigation and will be the same as those who accede to all of the grand jury evidence developed by themselves. Through the tutelage of these agents, testimony and documentary evidence will be presented to the grand jury. The case for the government is developed on an *ex parte* basis.

It has been stated that in the Anglo-American legal system cross-examination "is beyond doubt the greatest legal engine ever invented for the discovery of truth." (5 Wigmore, *Evidence,* § 1367 (Chadbourn, Rev. 1974)).[29] It is clear law that due process encompasses the right to cross-examine in civil cases as well as criminal cases. *Greene v. McElroy*, 350 U.S. 474 (1959). The private citizen is not given the opportunity to confront and cross-examine witnesses before the grand jury. This has been justified on the grounds that a grand jury hearing is investigative not adjudicative.[30]

There are good reasons for not permitting cross-examination in the grand jury room - namely, it is not supposed to be an adversary forum but is an investigative forum to determine whether or not to indict. To allow cross-examination would be disruptive of the process. But, it has been noted that the failure to provide the opportunity to cross-examine does great harm to the defendant when that testimony is derived on an *ex parte* basis and then used civilly.[31] The witness, who will be presumably later cross-examined in the civil trial, will have already been committed to a version of the events in the sworn and recorded record of the grand jury. It has been stated that, "Experience teaches that the leading questions that abound in *ex parte* examination can suggest their own answers which, once given, are later adhered to as the true version of events that have since faded into oblivion."[32] The evidence in such a setting is more rightly a display of the skill and artfulness of the questioner rather than a reflection of the unvarnished truth.

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[29] *See* Hassett, *supra* note 12, 1059.

[30] *Id.*, at 1059.

[31] *Id.*, at 1060.

[32] *Id.*, at 1061.

As IRS agents attorneys become more involved in the grand jury inves-this will permit *ex parte* development of witness stories. Further, the IRS would seek to gather all of the evidentiary materials and testimony possible in preparation of its civil claim, all to be obtained *wholesale* under Rule 6(e). There has been much criticism of the fact that in the criminal arena itself prosecutors have gone further than what is necessary to indict in order to obtain "commitments" to testimony without cross-examination.[33] This has resulted in the development of an "*ex parte* record" prior to trial.[34] This abuse can only become more compounded when IRS agents, working in close cooperation with the attorneys for the Department of Justice, also see an opportunity to develop a future adversary civil tax case on an *ex parte* basis. Testimony will be developed for "commitment" in the subsequent civil case. This is a gross inequity in pretrial evidence development that would impose a crushing burden of defense on civil defendants.

E. Breach Of Secrecy Will Inhibit Disclosure To The Grand Jury And Increase Fear Of Reprisal.

One of the unique and fundamental precepts of the grand jury procedure has been its secrecy, which has always been an inducement to voluntary and honest testimony by citizens and informants. It has been stated that the erosion of this secrecy will substantially inhibit such disclosure as it becomes known that such testimony will become public.[35] Fear of reprisal is a serious and real concern for grand jury witnesses, particularly those involved in organized crime.[36]

Even if an indictment has been returned, the need for secrecy is kept alive by the need to encourage witnesses to appear and identify in full in the future, free of reprisals from parties suspected of crime. *Baker v. United States Steel Corp.*, 492 F.2d 1074, 1079 (2d Cir. 1974). It has also been suggested that the knowledge that secrecy will not be guarded will reduce willingness of witnesses to testify against government officials for fear of becoming a subject of governmental persecution or of being barred from government employment or not being awarded government contracts or of not receiving other benefits.[37] This court has recognized such a reason for secrecy in the following manner:

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[33] *Id.*, at 1060.

[34] *Id.*, at 1061-1062.

[35] *See* Note, *Administrative Agency Access to Grand Jury Materials, supra* note 4, at 182.

[36] *Id.*, at 183; *See also* GAO Report, *supra* note 21; *see also Paz v. United States*, 462 F.2d 740, 747-748 (5th Cir. 1972) *cert. denied*, 414 U.S. 820 (1973).

[37] *See* Note, *Administrative Agency Access to Grand Jury Materials, supra* note 4, at 183.

> "One [reason for grand jury secrecy] is to encourage all witnesses to step forward freely without fear of retaliation . . . The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *United States v. Proctor & Gamble*, 356 U.S. 677, 681-682 (1958).

Also, in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), this Court condoned secrecy of the grand jury on many grounds but one was that "fear of business reprisal might haunt both the grand juror and the witness." (*Id.*, at 400). Wholesale disclosure to the IRS, even after indictment, increases the fear of retaliation and reprisal.

A witness who may testify against a taxpayer may also be reluctant to do so when it becomes known that his testimony can be routinely handed over to the IRS. Fear of reprisal by the IRS or fear of an audit of the witnesses' own tax returns would have a chilling effect.

III. THE INVITATION TO ABUSE OF THE GRAND JURY PROCESS WHICH WOULD BE ENTAILED IN THE GOVERNMENT'S INTERPRETATION OF RULE 6(e)(3)(C)(i) IS NEITHER SPECULATIVE NOR HYPOTHETICAL, BUT IN FACT HAS BEEN DEMONSTRATED ON VARIOUS OCCASIONS.

The fact that the IRS will seek and use the grand jury materials to conduct its civil administrative proceeding is not hypothetical. As noted above, it is extremely difficult to even detect grand jury abuse, because the very shroud of secrecy under which the grand jury operates also shrouds any detection of its abuse. Furthermore, the government's position in *Sells I* that its seeking of Rule 6(e) orders should be on an *ex parte* basis would result in further concealment of the operations of the government and its surrogates who conduct and direct the grand jury investigation. But, fortunately, there have been at least four (4) examples, all of which involve the IRS, which clearly show that the public policy concerns stated above are not hypothecated or speculative. These cases must reflect what is common practice and procedure in the relationship between the IRS and the Department of Justice Attorneys who conduct grand jury investigations.

The first such factualization of the use of the grand jury process as a marshalling yard for civil purposes is the fact situation in *Sells I* and *Sells II*, which has been detailed for the benefit of this Court in the Respondent's Brief filed in *Sells I*. The Court is requested to view this case as an opportunity to view in the cold light of real practice, a process which is conducted in secrecy. The extraordinary events revealed in *Sells I* stated in summary form here indicate that:

(a) The grand jury was assembled at the instigation of the IRS, which started that process less than three months after it was frustrated in its enforcement of administrative summons.

(b) The same IRS agents that conducted the administrative investigation were assigned to assist the U.S. Attorney in the grand jury investigation.

(c) The grand jury subpoenas sought records identical to those sought by the administrative summons that had been stayed.

(d) The IRS agents caused grand jury subpoenas to be served on witnesses to appear before the grand jury and then induced them to proceed with "voluntary" interrogation before them on the promise that if they cooperated they need not appear before the grand jury.

(e) The interrogations by the IRS agents were done not only in the absence of the grand jury but often in the absence of any U.S. Attorney.

(f) None of the key witnesses ever testified before the grand jury.

(g) There appears to have been grand jury subpoenas issued when no designated grand jury was assembled to hear the witnesses testify on the matter on the return date specified in the subpoenas.

(h) At least 19 IRS personnel are known to have been involved. IRS pesonnel were given access to grand jury materials during the grand jury investigation without any court order and several personnel from a private stenographic firm were utilized in the voluntary interrogations under subpoena without a Rule 6(e) order, all as early as a full year before the 1977 amendment to Rule 6(e).

(i) The indicting grand jury was given only summary testimony by the IRS agents as a basis for indictment, and it never heard any of the witnesses that the IRS interrogated.

(j) An Agreed Statement of Facts In Support of Guilty Pleas, with detailed financial schedules, was drafted by the IRS that also constitutes an admission of specific civil tax liability, and the defendants were required to sign it as a condition of their plea bargain. One obvious purpose for the very detailed financial information and schedules contained in this nineteen page Statement was to set out an admission tabloid for ensuing civil proceedings. No 6(e) order was obtained to use grand jury materials to prepare this statement until eighteen months later.

(k) At the conclusion of the grand jury investigation one of the same agents--armed with the signed admission of liability extracted as part of the plea bargain and with the disclosure of the grand jury materials for civil use later obtained under Rule 6(e)--resumed the "regular" tax collection procedures some four years after the original administrative investigation halted.

The factual scenario in *Sells I* involving IRS behavior provides a tangible example of how the IRS can be normally assumed to act, if given the authority. The facts in *Sells I* strongly suggest that the grand jury investigation was initiated for a dual purpose--to obtain civil discovery in connection with a criminal investigation. Even if the IRS arguably had not initially instigated the grand jury proceeding for the additional purpose of obtaining civil discovery, it certainly directed the grand jury investigation toward that end. In short, the grand jury was navigated for the dual purpose of civil and criminal investigation.

Another vivid example of the manner in which the IRS will act if given the green light by this Court is seen in *Robert Hawthorne, Inc. v. Director of Internal Rev.*, 406 F.Supp. 1098 (E.D. Pa. 1976). *Hawthorne* is not cited for its legal conclusions and Intervenors take exception to the legal characterization of the factual situations therein. However, the factual situation in *Hawthorne* is reality. A similar *modus operandi* was revealed in the factual situations in *In re Grand Jury, J. R. Simplot Co.*, 77-1 U.S.T.C. (C.C.H.) par. 9146 (9th Cir. 1977), *withdrawn as moot on other grounds* 77-2 U.S.T.C. par. 9511 (9th Cir. 1977); in *In re April 1977 Grand Jury Proceedings, United States v. General Motors*, 506 F.Supp. 1174 (E.D. Mich. 1981) appeal pending, No. 81-1182 (6th Cir.); and in *Sam Cohen, supra* note 28.[38]

A description of the facts in *Simplot* and *Hawthorne* is set out in the Brief of Respondents in *Sells I* before this Court and Intervenors refer this Court to said description for further illustration of the way the IRS and other administrative agencies can be expected to act in connection with grand jury investigation. The brief of General Motors filed by way of *amicus curiae* in this case details the factual scenario in the *General Motors* case.

The final fact which indisputably confirms that the role of the IRS in grand jury investigation is not for the simple purpose of assisting federal attorneys for the government in the performance of their federal criminal duties is an admission of this fact by the United States. In its Brief, the

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[38] A detailed exposition of the factual scenario involving IRS involvement in the grand jury in the *General Motors* case is set out in the *Amicus Curiae* brief filed by General Motors in the case herein.

United States admits that if its interpretation does not prevail, the IRS would become less likely to render its assistance to criminal investigation (Petitioner's Brief, pages 33 and 36). In other words, the assistance of the IRS to the attorneys for the government under Rule 6(e)(3)(A)(ii) appears to be predicated upon a subsequent disclosure to the IRS at the end of the investigation under 6(e)(3)(C)(i), or else IRS assistance will "dry up."[39] Although the government tries to reduce this argument to one based upon the efficient use of governmental financial resources, this cannot and should not be a basis for this Court's forging in iron what will become a routine joint investigative alliance between the IRS and the Justice Department. If the argument is based on economics, then economics must lead to the inescapable conclusion that in all criminal tax cases, the IRS agent assigned the civil tax responsibility should (1) be appointed as the agent to assist in the criminal investigation and (2) be subsequently granted Rule 6(e) disclosure of the grand jury materials. In such cases, there will virtually be no more useful purpose in the administrative summons. As soon as the slightest suspicion of criminality might be conjured, the machinery of the grand jury process will be set in motion, and the administrative powers of the IRS need no longer be exercised since they will be eclipsed by the far greater *ex parte* investigative powers of the grand jury.

CONCLUSION

The judgment of the court of appeals should be affirmed.

November 12, 1982

Respectfully submitted,

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[39] *See also* the analyses of this "strings attached" policy of the IRS as set out in the Brief of Respondents in *Sells I* at ARGUMENT I, C referencing to and quoting from specific Internal Revenue Manual sections.

Docket Sheet

O. 81-1938-CFX

TITLE United States, Petitioner
v.
James E. Baggot

DOCKETED Apr. 19, 1982

COURT United States Court of Appeals for the Seventh Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondent:
Feb. 8, 1982	Application for an extension of time to file petition for writ of certiorari and order granting same until April 19, 1982 by Stevens, J, Feb. 10, 1982.
Apr. 19, 1982	Petition for writ of certiorari filed.(RECORD FILED).
May 12, 1982	Order extending time to file a response to the petition until May 28, 1982.
June 1, 1982	Brief for the respondent in opposition filed.
June 1, 1982	DISTRIBUTED. 6-17.
June 14, 1982	Reply memorandum for the U. S. filed. (D).
June 21, 1982	Petition GRANTED.

July 15, 1982	Motion of the Solicitor General to dispense with printing the joint appendix filed.
July 21, 1982	DISTRIBUTED. SL11P4. (Above motion).
Aug. 5, 1982	Order extending time to file the petitioner's brief on the merits until Sept. 4, 1982.
Sept. 9, 1982	Brief for petitioner U. S. filed.
Oct. 4, 1982	The motion of the Solicitor General to dispense with printing the joint appendix is GRANTED.
Oct. 8, 1982	Application for leave to file respondent's brief on the merits in excess of page limitations, and order granting same by Stevens, J., 10/12/82, not to exceed 60 pages.
Nov. 12, 1982	Brief, amicus curiae, for General Motors Corporation filed.
Nov. 15, 1982	Brief for the respondent filed.
Nov. 15, 1982	Brief, amicus curiae, of Fred Witte, B&W Investments and Center Glass Company No. 3 filed.
Dec. 14, 1982	CIRCULATED.
Feb. 22, 1983	Reply brief for the U. S. filed. (D).
March 2, 1983	ARGUED.